TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1903~~ 1904.

No. ~~163~~ 16.

METROPOLITAN RAILROAD COMPANY, APPELLANT AND PLAINTIFF IN ERROR,

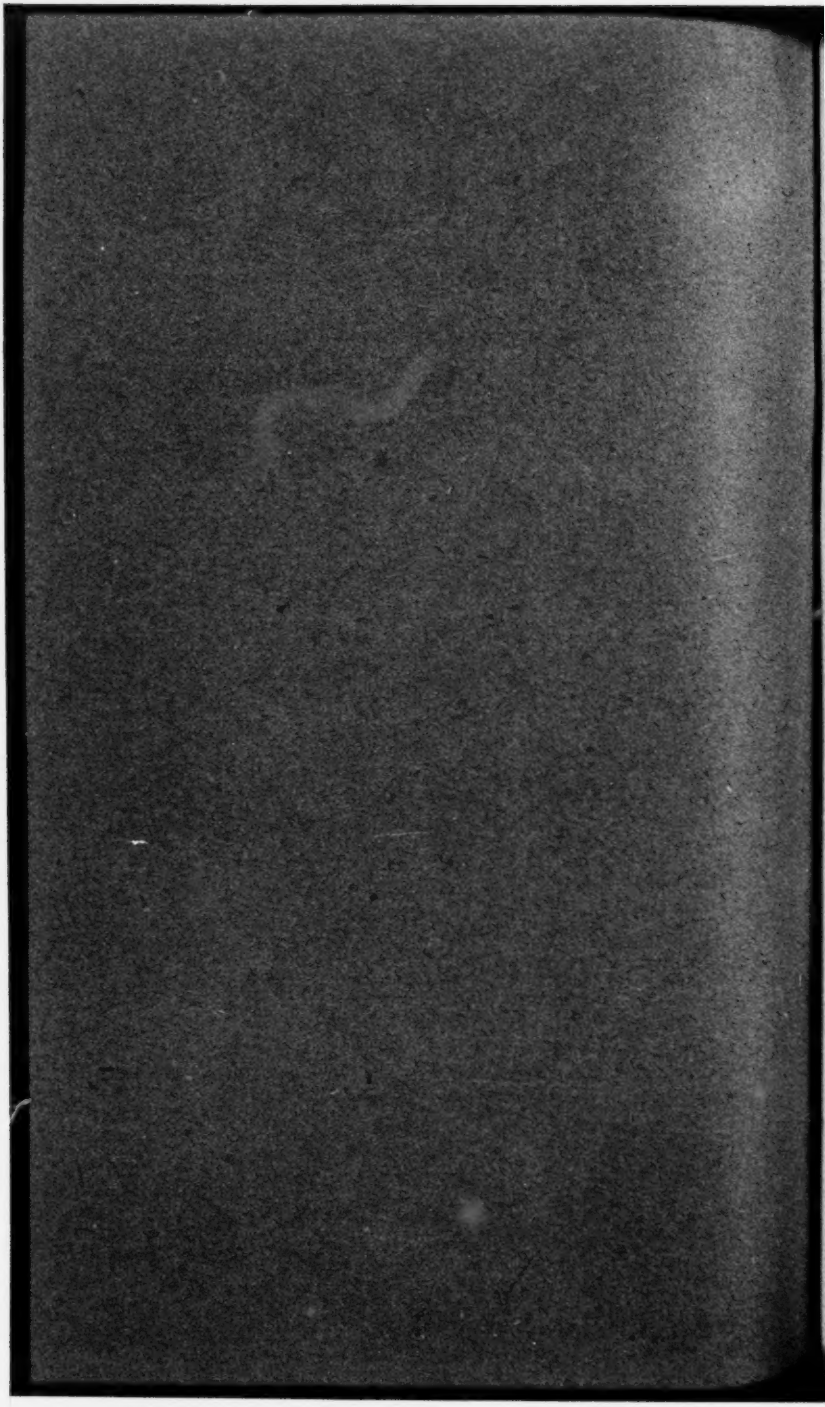
vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, AND JOHN BIDDLE, COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

APPEAL FROM AND IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 9, 1903.

(18,778.)



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1 In the Court of Appeals of the District of Columbia.

METROPOLITAN RAILROAD COMPANY, Appellant,
vs.
HENRY B. F. MACFARLAND ET AL., Comm'rs, D. C. } No. 1147.

Supreme Court of the District of Columbia.

In re WIDENING OF COLUMBIA ROAD AND SIXTEENTH STREET. No. 577, District Court.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition.

Filed Jul- 12, 1900.

In the Supreme Court of the District of Columbia, Sitting as a District Court.

In re WIDENING OF COLUMBIA ROAD AND SIXTEENTH STREET.

The petition of Henry B. F. Macfarland, John W. Ross, and Lansing H. Beach respectfully shows:

1. That they are the Commissioners of the District of Columbia, and by the provisions of the act of Congress approved June 6, 1900, entitled "An act authorizing and requiring the Metropolitan Railroad Company to extend it- lines on old Sixteenth street," they were directed to institute, by petition, a proceeding in this court to condemn the land necessary for the widening of Columbia road to a width of one hundred feet, and the present Sixteenth street to a width of eighty-five feet from Columbia road to Park street.

2. That a map of the proposed extension or widening of Columbia road and Sixteenth street, showing the number and designation of the parcels of land affected thereby, the names of the owners thereof, and area of the land to be condemned for such widening, has been prepared and a copy thereof is hereto annexed, marked "Exhibit D. C. No. 1," and made a part of this petition.

3. That in and by said act of Congress it is provided, among
2 other things, as by reference thereto will appear, "That of the amount found to be due and awarded as damages for and

in respect of the land condemned for the extension of Columbia road and present Sixteenth street, as herein provided, such proportional amount thereof as the jury shall determine shall be assessed as benefits, and to the extent of such benefits, against respectively the Metropolitan Railroad Company and against those pieces or parcels of land on each side of said Columbia road and the present Sixteenth street northwest along those portions of said streets that are to be widened, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia road and the present Sixteenth street northwest as said jury may find said pieces or parcels of land will be benefited; and in determining the amounts to be assessed against said pieces or parcels of land the jury shall take into consideration the respective situations of such pieces or parcels of land and the benefits they may severally receive from the extension of Columbia road as aforesaid." Wherefore your petitioners pray:

1. That Edward J. Stellwagen, George G. Brown, Albert E. Paine, Mary B. McReynolds, Timothy E. Wilcox, Clara B. Wilcox, Fannie C. Morey, Grace C. Morey, A. M. McLachlen, Robison White, George H. Dana, William W. Brown, Louisa D. Breckenridge, Edwin Shuffle, Isaac Hazlett, Elizabeth S. Smith, Butler F. Abbott, Louis P. Shoemaker, Henrietta Copperthwait, George P. Van Wyke, Jr., Mary I. McAllister, George Whitney White, Waddy B. Wood, Ebenezer J. Hill, Frederick A. Hill, Jacob B. Rawles, Mary H. Myers, Robert S. Woodward, Lauretta B. Gibson, George N. Rider, Lucy H. Diver, Elizabeth F. Sicard, David Crammer, Harriet L. Vining, Henry Hovey, Howard University, Eddy B. Townsend, Jennie B. Swaim, Mary E. Butterworth, William Butterworth, Robert H. Montgomery, Wastmoreland D. Davis, Elizabeth R. Chapman, William M. Scott, John D. Langhorne, Mary Swaim Thompson, Elbert Robertson, Oliver A. Morris, Matthew W. Edmonds, Katherine M. Edmonds, Stanley Pearce, Mary H. Langtree, David Ingalls, Alexander Grant, George F. Stone, Elizabeth Varney, Katherine S. Foos, John B. Henderson, Arthur H. Whitlark, David A. Irwin, James A. Bates, Charles H. Armes, Ellen Henriques, Edward C. Barnard, Herbert B. Blair, Mary F. Henderson, Mary A. Cushing, Carl E. Pelz, Priscilla E. Hendley, Levi Nagle, John B. Roach, J. Frank Black, Frances B. Dare, Alvin G. Belt, D. E. Parker, Robert N. Bayles, Sadie Tilley, Maria Johnson, Frederick J. Loudin, Anna M. Heinz, Henry D. Williams, Florence B. Solger, Josephine Thompson, William C. Borden, Julian C. Dowell, Southwich C. Briggs, Elizabeth Walbridge, John M. Clapp, Louis Baillieux, Alice Chase, W. Briggs, owners of the land proposed to be condemned, may be cited to attend this court at a day to be fixed by the court, and to continue in attendance until the court shall have made its final order ratifying and confirming the award of damages and assessments of benefits to be made by a jury summoned hereunder.

3 2. That this court shall cause public notice to be given by advertisement in such manner as the court shall prescribe, a

required by the provisions of said act, warning all persons interested in this proceeding to attend this court at a day to be fixed in said notice, and to continue in attendance until the final confirmation of any award of damages and assessment of benefits that may be made in this proceeding.

3. That a jury of seven judicious, disinterested men may be summoned by the marshal of the District of Columbia to condemn the land necessary for the extension of said Columbia road, and to assess the benefits resulting therefrom, as required by said act of Congress.

4. That the land hereinbefore described, necessary for the widening of Columbia road and old Sixteenth street, may be condemned by the order and decree of this court.

5. And for such other and further relief as the nature of the circumstances of the case require and to this court shall seem proper.

HENRY B. F. MACFARLAND,
JOHN W. ROSS,
LANSING H. BEACH,
Commissioners of the District of Columbia.

A. B. DUVALL,
C. A. BRANDENBURG,
Attorneys for Petitioners.

DISTRICT OF COLUMBIA, *ss:*

Henry B. F. Macfarland and Lansing H. Beach upon oath say that they and John W. Ross are the Commissioners of the District of Columbia, and that they have read the foregoing petition by them subscribed as such Commissioners and know the contents thereof, and that the facts therein stated upon their personal knowledge are true, and those stated upon information and belief they believe to be true.

HENRY B. F. MACFARLAND.
LANSING H. BEACH.

Subscribed and sworn to before me this eleventh day of July, 1900.

WILLIAM TINDALL,
Notary Public, D. C.

[Endorsed:] 577. Dist. Ct. Copy. Petition. 4.

In the Supreme Court of the District of Columbia, Holding a District Court.

Filed August 2, 1900. J. R. Young, Clerk.

In re WIDENING OF COLUMBIA ROAD AND SIXTEENTH STREET. No. 577, Dist. Court.

It appearing to the court that the marshal, as directed by the order of the 1st inst., has summoned Robert I. Fleming,
4 Thomas W. Smith, John A. Hamilton, Edward Grover, James F. Oyster, W. A. H. Church and Henry O. Towles as the jury herein, and the court having accepted said jury as duly qualified, and having administered to them the oath, as provided in the act of Congress under which these proceedings are instituted, and the said jury having been organized, it is, this 2nd day of August, 1900—

Ordered that said jury view the land and premises to be condemned herein, and thereafter, on Friday, the 3rd day of August, 1900, at 2 o'clock p. m., and from time to time as they may determine by adjournment, they shall, in circuit court-room number two, or at such other place as may be convenient, hear and receive such evidence as may be offered or submitted to them on behalf of the District of Columbia and by any person or persons having any interest in the above-named proceedings for the "widening of Columbia road and Sixteenth street;" and when such hearing is concluded, the said jury or a majority of them shall return to the court in writing its verdict of the amount found to be due and payable as damages sustained by reason of such widening, and of the pieces or parcels of land benefited by such widening and the amount of the assessment for such benefits against the same and against the Metropolitan Railroad Company, in accordance with the act of Congress approved June 6, 1900, entitled "An act authorizing and requiring the Metropolitan Railroad Company to extend its lines on old Sixteenth street."

By the court:

JOB BARNARD, *Justice.*

In the Supreme Court of the District of Columbia, Sitting as a District Court.

Filed August 20, 1900. J. R. Young, Clerk.

In re WIDENING OF COLUMBIA ROAD AND SIXTEENTH STREET. No. 577.

Answer of the Metropolitan Railroad Company.

The respondent, The Metropolitan Railroad Company, for answer to the petition of Henry B. F. Macfarland, John W. Ross, and Lansing H. Beach, herein filed, shows to the court as follows:

This respondent is not the owner of any real estate or other property whatsoever, either abutting upon or adjacent to either Columbia road or Sixteenth street, along the portions of said road and street which are proposed to be widened, as set forth in said petition, and while, as it is informed, the former management of this respondent requested permission, at a previous session of Congress, to extend its lines over said Columbia road and Sixteenth street, it avers that the said application was then denied, and that no renewal thereof was ever made by this respondent, nor was any such application made by or on its behalf to the Congress by which the act of June 6th, 1900, referred to in said petition, was passed.

5 This respondent is advised and believes, and therefore avers, that the said act of Congress of June 6th, 1900, is unconstitutional, illegal, and void, in so far as it seeks to compel this respondent to extend its lines over the territory in question, and then to condemn land for public uses along the said extension which this respondent is thus required to make, and to compel it to pay therefor, under the guise or on the ground of speculative benefits to it from the said compulsory extension of its lines, and in the absence of any property owned by it and which could be benefited by the said contemplated condemnation proceedings.

As respondent is advised and believes, and therefore avers, the said act of Congress and any proceeding thereunder seeking to assess against it any portion of the cost of the lands proposed to be condemned is and must be to that extent wholly nugatory and void.

Wherefore respondent prays that this court will, by its order, dismiss said respondent wholly from the said proceedings, and will instruct any jury impanelled under any proceedings in this cause that no part of the cost of any lands which may be condemned thereunder can be assessed against it.

METROPOLITAN RAILROAD COMPANY,
By GEO. H. HARRIES, *Vice-President.*

J. J. DARLINGTON, *Solicitor.*

DISTRICT OF COLUMBIA, *ss:*

I, Geo. H. Harries, on oath say that I am the vice-president of The Metropolitan Railroad Company, respondent in the above-entitled cause; that I have read the foregoing answer by it subscribed and know the contents thereof, and that the allegations set forth on personal knowledge are true, and those set forth on information and belief I believe to be true.

GEO. H. HARRIES.

Subscribed and sworn to before me this 18th day of August, A. D. 1900.

DENIS J. DOWNING,
Notary Public.

[SEAL.]

Instructions Rejected.

Filed August 21st, 1900. J. R. Young, Clerk.

The jury is instructed that no benefits can be assessed by it against the Metropolitan Railroad Company as such, but that it can assess benefits only against such property of said company, if any, as it shall find will be benefited by the proposed widening and extension of Sixteenth street and Columbia road, and to the extent, if any, to which it shall find such property will be benefited by such widening and extension, just as in the case of the property of other owners which it may find will be so benefited.

Rejected, with permission to present later.

6 *Instruction.*

Filed August 21st, 1900. J. R. Young, Clerk.

In assessing benefits against property-owners the jury shall not take into consideration such benefit as may be the result of the extension of the railroad tracks along said street or road, but only such as would result from the widening.

Rejected, with permission to present later.

In the Supreme Court of the District of Columbia, Holding United States District Court.

Filed Sept. 5th, 1900. J. R. Young, Clerk.

In re EXTENSION OF SIXTEENTH STREET. No. 577.

Darlington's.

Please take notice that on Wednesday next, the 5th day of September, 1900, at 10 o'clock a. m., or so soon thereafter as counsel can

be heard, I shall re-present to the court the instruction on behalf of the Metropolitan Railroad Company offered and overruled heretofore, to-wit, on the 21st day of August, 1900, pursuant to the leave then granted to re-present the same, copy of said instructions being hereto annexed, the right being also hereby reserved to present to the court at the same time and place such other of the instructions on behalf of the said railroad company, copies of which are also hereto annexed, and of any other instructions on its behalf as the action of the court may, in the judgment of its counsel, make necessary or appropriate.

J. J. DARLINGTON,
Att'y for the Metropolitan Railroad Company.

Instructions Heretofore Offered and Overruled.

1*a*. The jury is instructed that no benefits can be assessed by it against the Metropolitan Railroad Company as such, but that it can assess benefits only against such property of said company, if any, as it shall find will be benefited by the proposed widening and extension of Sixteenth St. and Columbia road, and to the extent, if any, to which it shall find such property will be benefited by such widening and extension, just as in the case of the property of other owners which it may find will be so benefited.

Refused, and exception by Darlington.

1*b*. The jury is instructed that under the evidence in this case it can make no assessment of benefits against the Metropolitan Railroad Company.

Refused, and exception by Darlington.

7 Filed September 5th, 1900. J. R. Young, Clerk.

2. The jury is instructed that it can assess such benefits only against the Metropolitan Railroad Company, if any, as it has been shown by the evidence in the case will result to said company from the extension of Columbia road and present Sixteenth street, as provided in the act of Congress approved June 6th, 1900.

Granted, & exception by D. C. and also by G. F. Williams on behalf of certain property-owners.

3. The jury is instructed that it is not required to assess any part of the amount which it shall award as damages for and in respect of the land condemned in these proceedings against the Metropolitan Railroad Company, and that it is its duty not to do so unless it is satisfied by a fair preponderance of the evidence that the said company will be specially benefited by the proposed extension of Columbia road and the present Sixteenth street, and, in case it shall be so satisfied, it is its duty to assess against the said railroad company only such sum as shall be a fair and reasonable measure of such benefits.

Granted, and exception by D. C. and also by G. F. Williams on behalf of certain property-owners.

4. In determining the question whether or not said railroad company will be benefited by the said extension and the extent of such benefit, if any, the jury should consider the cost to which said company will be put in extending its lines from its present terminus, as provided in the act of June 6th, 1900, and the increased cost of operating its said lines as shown by the testimony, in connection with such evidence in the case as may tend to establish the fact and amount of such benefits to it.

Granted, & exception taken by D. C. and also by G. F. Williams on behalf of certain property-owners.

In the Supreme Court of the District of Columbia, Sitting as a District Court.

Filed September 27th, 1900. J. R. Young, Clerk.

In re THE WIDENING OF COLUMBIA ROAD AND THE PRESENT SIXTEENTH STREET NORTHWEST. No. —, District Court.

We, the jury in the above-entitled cause, hereby find the following verdict and award of damages for and in respect of the land condemned and taken for the widening of Columbia road to a width of one hundred feet and the present Sixteenth street to a width of eighty-five feet from Columbia road to Park street, etc., as shown on a plat or map filed with the petition in this cause, amounting to the sum of one hundred and eighty-one thousand and eight hundred and fifty-eight dollars [$181,858.00], as set forth in Schedule 1, hereto annexed as part hereof.

And we, the jury aforesaid, in accordance with the act of Congress approved June 6, 1900, for the widening of Columbia road
8 and the present Sixteenth street, do hereby find the amount of benefits resulting therefrom to be the sum of ninety thousand and nine hundred and twenty-nine dollars [$90,929.00] and twenty-five thousand dollars [$25,000.00.]

And we, the jury aforesaid, find that the Metropolitan Railroad Company [called in said act the Metropolitan Street Railroad Company] will be benefited by the aforesaid widening of Columbia road and the present Sixteenth street, and that the pieces and parcels of land that will be benefited by the aforesaid widening of Columbia road and the present Sixteenth street are the pieces and parcels of land on each side of said Columbia road and the present Sixteenth street where said streets are to be widened, and the other pieces and parcels of land mentioned and described in Schedule 2, hereto annexed as part hereof; and we find that the Metropolitan Railroad Company and the several pieces and parcels of land in said Schedule 2 will be benefited, as aforesaid, to the extent of the respective

amounts mentioned and set forth in said Schedule 2, and we assess against the Metropolitan Railroad Company and the pieces and parcels of land respectively as and for benefits, as aforesaid, the several amounts mentioned, specified, and set forth in said Schedule 2.

Witness our hands and seals this 25th day of September, A. D. 1900.

ROBERT I. FLEMING.
EDWARD GRAVES.
JAS. F. OYSTER.
HENRY O. TOWLES.
THOS. W. SMITH.
JOHN A. HAMILTON.
W. A. H. CHURCH.

SCHEDULE No. 2.

Metropolitan Railroad Company [called in bill Metropolitan Street Railroad Company].
Assessment, $25,000.00.

In the Supreme Court of the District of Columbia, Holding a District Court.

Filed October 17th, 1900. J. R. Young, Clerk.

In re THE WIDENING OF COLUMBIA ROAD AND THE PRESENT SIXTEENTH STREET N. W.

Order Nisi, Finally Confirming Verdict, Award, and Assessment of Jury.

It appearing to the court that on the 27th day of Sept., 1900, there was filed in this cause the verdict and award of the jury summoned by the marshal under the order heretofore passed herein to ascertain and award the damages which each owner of land may
9 sustain by reason of the widening of Columbia road and Sixteenth street and the condemnation of lands for the purposes of such widening, and to assess the benefits resulting therefrom against, respectively, the Metropolitan Street Railroad Company and against those pieces or parcels of land on each side of said Columbia road and the present Sixteenth street northwest along those portions of said streets that are to be widened, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia road and the present Sixteenth street northwest, and that in and by said verdict said jury has found due and awarded as and for damages for and in respect of the land condemned and taken for the widening of Columbia road to a width of one hundred feet and the present Sixteenth street to a width of

eighty-five feet from Columbia road to Park street, as shown on a plat or map filed with the petition in this cause, amounting to the sum of one hundred and eighty-one thousand eight hundred and fifty-eight dollars [$181,858], as set forth in "Schedule 1," annexed to said verdict, namely:

And that in and by said verdict said jury has assessed the benefits resulting from the aforesaid widening of Columbia road and Sixteenth street as follows:

Against the Metropolitan Railroad Company the sum of twenty-five thousand [$25,000] dollars.

In the Supreme Court of the District of Columbia, Sitting as a District Court.

Filed Oct. 29, 1900. J. R. Young, Clerk.

In re WIDENING AND EXTENSION OF COLUMBIA ROAD AND SIXTEENTH STREET. No. 577.

Exceptions by Metropolitan Railroad Company to Assessment of Benefits Against It.

The Metropolitan Railroad Company excepts to the finding, assessment, and award against it for alleged benefits to it from the proposed widening and extension of the said Columbia road and Sixteenth street, and for cause or ground of exception shows:

1. That the said finding, assessment, and award are without evidence to support the same.

2. That the said finding, assessment, and award are contrary to the evidence.

3. That the said finding, assessment, and award are contrary to the weight of the evidence.

4. For errors of law in the instructions given and refused by the court to the jury over the objection and exception of the Metropolitan Railroad Company before the said finding, assessment, and award were made, as shown by the record of the said cause.

J. J. DARLINGTON,
Attorney for the Metropolitan R. R. Company.

10 In the Supreme Court of the District of Columbia, Holding a District Court.

Filed Nov. 23, 1900. J. R. Young, Clerk.

In re WIDENING OF COLUMBIA ROAD AND SIXTEENTH STREET NORTHWEST. No. 577, Dist. Court.

Motion to Finally Confirm Verdict.

Now come The Commissioners of the District of Columbia, petitioners herein, by their attorneys, and move the court to finally confirm the verdict, award, and assessment of the jury filed herein, notwithstanding the objections filed thereto.

A. B. DUVALL,
C. A. BRANDENBURG,
Attor'y- for Petitioners.

Please take notice that the foregoing motion will be called for hearing on Saturday, November 24, 1900, at 10 o'clock a. m., before Mr. Justice Hagner, holding the district court.

A. B. DUVALL,
C. A. BRANDENBURG,
Attorneys for Petitioners.

DISTRICT OF COLUMBIA, *sct:*

Personally appears Thomas J. Gorman, who, being duly sworn, deposes and says that on Wednesday, Nov. 21, 1900, at 6.00 p. m., he deposited in the United States mail-box in front of premises 472 Louisiana avenue, city of Washington, D. C., sealed official free-delivery envelopes, each containing a copy of the above motion and notice, addressed to the following persons: E. H. Thomas, att'y for George W. Brown and John H. Clapp; Chapin Brown, att'y for Louis Bailleux, Harriet L. Vining, Lydia A. Tanner, and Lucy H. Diver; Newton & Gillett, att'ys for Mary A. Cushing, Elizabeth Varney, Isabella Varney, Katherine Foos, Davis Ingalls, Mary H. Lampfree, and Arthur H. Whitlark; F. W. McReynolds, att'y for Mary B. McReynolds; J. J. Darlington, att'y for Metropolitan railroad; George N. Rider; Robert E. Longstreet; Louise D. Breckenridge; W. A. McKenney, att'y for Amer. Security & Trust Co., trustee of H. P. Dame; George Francis Williams, att'y for Butler F. Abbott, Elbert Robertson, and Oliver A. Morris; Gordon & Gordon, att'y- for Westmoreland D. Davis; W. W. Brown; Donald McPherson (in proper person), att'y for F. David Crammer, Francis B. Dare, Gertrude M. Guy; Mary E. Mann; Charles D. Walcott; Donald McPherson, att'y for M. F. Finley; T. B. Sanders; W. W.

Edwards, att'y for Peter J. Heinz; Alan O. Clephane, att'y for Pricilla E. Hendley; and John Ridout, att'y for Henry M. Walter.

THOMAS J. GORMAN.

11 Subscribed and sworn to before me this 22nd day of November, A. D. 1900.

A. LEFTWICH SINCLAIR,
Notary Public, D. C.

WM. F. MATTINGLY,
Att'y for Breckenridge.

C. E. PELZ.

Nov. 30.

April 3.

J. MILLER KENYON.

In the Supreme Court of the District of Columbia, Holding a District Court.

Filed November 28th, 1900. J. R. Young, Clerk.

In re WIDENING OF COLUMBIA ROAD AND SIXTEENTH STREET EXTENSION. No. 577, District Court.

Petition of Metropolitan R. R. Company to Make of Record Testimony as to Benefits to Metropolitan R. R. Co.

Now comes the Metropolitan Railroad Company and, showing to the court that the evidence in the above case was had before the jury without the presence of any justice of the court, and further showing to the court that the only evidence as to the benefits arising or to arise to this respondent from the proposed street widening and extension was that of James B. Lackey, as shown by the accompanying affidavit of E. H. Thomas, Esq., and further showing to the court that the testimony of the said James B. Lackey before the jury was taken down stenographically, a complete and correct transcript of the whole of which testimony is hereto annexed, as shown by the accompanying affidavit of Thomas J. Gorman, the stenographer who reported the same, prays the court that the said deposition of the said James B. Lackey may be filed as a part of the record in this case, the same being essential to the hearing and the determination of this respondent's exceptions to said award filed in this cause, and it being impossible for this respondent properly to defend its rights in the premises without in some way causing the said evidence and the fact that it was the only evidence in the case upon the question of said benefits to this respondent to appear of record.

DISTRICT OF COLUMBIA, *ss:*

I, James B. Lackey, on oath say that I am the secretary of the respondent, Metropolitan Railroad Company; that I have read and know the contents of the foregoing petition on its behalf subscribed with its name by me as its secretary; that the allegations therein set forth as of personal knowledge are true, and that those set forth upon information and belief I believe to be true.

JAMES B. LACKEY.

12 Sworn to and subscribed before me this 23rd day of November, 1900.

F. J. WHITESIDE, [SEAL.]
Notary Public.

Endorsed: Let the within petition be filed. A. B. Hagner, justice.

In the Supreme Court of the District of Columbia, Holding a District Court.

In re WIDENING OF COLUMBIA ROAD AND SIXTEENTH STREET EXTENSION. No. 577, Dist. Court.

DISTRICT OF COLUMBIA, *ss:*

I, Edward H. Thomas, on oath say that I am a member of the bar of the District of Columbia; that I was present at all the hearings before the jury of condemnation in the above-entitled cause, and that James B. Lackey was the only witness who testified before said jury upon the question of benefits to the Metropolitan Railroad Company arising or to arise out of the street widening and street extension contemplated in the above proceedings.

EDWARD H. THOMAS.

Sworn to and subscribed before me this 23rd day of November, 1900.

HENRY J. GROSS,
Notary Public.

[SEAL.]

In the Supreme Court of the District of Columbia, Holding a District Court.

In re WIDENING OF COLUMBIA ROAD AND SIXTEENTH STREET.
No. —, Dist. Court.

Before jury of condemnation, August 24, 1900.

Testimony of James B. Lackey, a Witness Called by and in Behalf of the Metropolitan Railroad Company.

Direct examination by Mr. DARLINGTON:

Q. Please state your name and occupation.
A. James B. Lackey, secretary of the Metropolitan Railroad Company.
Q. What relation, if any, do you bear to the Anacostia and Potomac Railway Company?
A. At the present time?
Q. Yes.
A. Secretary; I am its secretary, too.
Q. What were you during its period of recent construction?
A. Its secretary.
Q. Are you familiar with the cost of the construction of an underground electric railroad in this city?
A. I am.
Q. What is the length of the extension which your company will be required to make in compliance with the law?
13 A. Forty-seven hundred feet.
Q. What will be the actual cost of the construction?
A. One hundred and seventeen thousand dollars.
Q. What do you figure out the annual expense of the company will be, assuming you borrow at five per cent.?
A. Very close to five thousand eight hundred and fifty dollars.
Q. About six thousand dollars?
A. About six thousand will be the interest charged on the expense of the construction.
Q. That is the expense without any sinking fund?
A. That is the expense without anything except the interest on the money that goes toward the construction of the road.
Q. Have you made any computation of the addition to your annual expenses?
A. We have figured out that it will take at least two cars, and to operate two cars for the year it will take possibly eight thousand dollars.
Q. The cars cost you how much a day—running expenses for each?

A. Ten dollars a day.

Q. So that fourteen thousand dollars will represent your increased expenditure, being merely the interest on the cost of the construction of the road and your operating expenses, without touching the principal?

A. Yes, sir.

Q. Assuming that you never paid the principal back, how many additional passengers per day will be required to meet these fixed charges and operating expenses?

A. In the neighborhood of three hundred and thirty thousand people a year.

Q. How many will that make per day?

A. Nine hundred people per day.

Q. Nearly a thousand passengers a day?

A. Just about.

Q. So unless this extension increases your travel one thousand people per day, you will not get back your fixed charges and operating expenses?

A. No, sir.

Q. In your opinion, what financial benefit will that be to the Metropolitan Railroad Company—in the immediate or future time?

A. Immediately, there is none. If you look at the future—in that event you will have to look back and see what other roads have done.

Q. Is there any rule or principle governing the construction and operation of railroads which would enable you to determine within a definite time when you would begin to pay expenses?

A. Absolutely none. It depends upon the property-owners. We are at their mercy. We cannot tell; there is no way of telling.

Q. To what extent, if at all, did your companies contribute to the passage of this law. Were you for or against it?

A. We made no effort whatever to get this bill through. Made no effort at all.

Cross-examination by Mr. BRANDENBURG:

Q. Did you make any effort to oppose the passage of it?

A. We opposed a certain feature of it.

Q. You opposed merely the assessment feature?

14 A. Not only that; we opposed the feature of the territory not being ready for the railroad.

Q. So that your opposition was merely on the ground of the non-necessity of immediate construction; is that right? That, in addition to the assessment for benefits?

A. Yes.

Q. As a matter of fact, *Ben*, is not the idea of constructing a railroad out in this direction along Columbia road and out Sixteenth street, or did not that idea originate with your company?

A. I cannot saw that it did.

Q. Did your company originally make an attempt to construct a road through there?

A. I am not familiar with that part of it.

Q. You have been connected with the company for several years. Are you in a position to say that your company did request it?

A. I have only been connected with the company for two years.

Q. What railroad exists east of Fourteenth street and out in that direction, if any, in which the Washington Traction Company is interested? What railroad, if any, does there exist out in that direction?

A. The Metropolitan Railroad Company is the only company that owns any line out there.

Q. Where is that line?

A. Along Connecticut avenue to Eighteenth street and Columbia road.

Q. Now, east of Fourteenth street, what roads are there that operate out in that direction?

A. The next road is the Georgetown and Tennallytown road out Thirty-second street.

Q. I mean east.

A. The Brightwood Railway Company, on Seventh street.

Q. Has the Metropolitan Railroad Company ever desired to effect a connection between its lines of this city and a railroad east of Fourteenth street?

A. Not to my knowledge.

Q. Would it or would it not be a very desirable thing for your company to connect the Metropolitan Railroad Company with such a line?

A. On Ninth street?

Q. Yes.

A. No.

Q. Don't you consider that it is a very desirable franchise to operate out Columbia road and out Sixteenth street?

A. Any territory built up with houses would be a desirable place.

Q. Would you consider this a very desirable franchise?

A. I cannot say that I do.

Q. I ask you if the company does or does not want the privilege of constructing and operating a road along this line?

A. I suppose I should be in a position to answer that question, but I do not think it is a question that I should. It is a question that the board of directors should answer.

Q. You do not seem privileged to express the wishes of your company.

A. No, sir.

Q. The company would not decline anything advantageous to it, would it?

A. No, sir.

Q. Do you consider that anything that will carry you through the northwest section exceedingly desirable?

A. If we can get it upon terms profitable to us.

15 Q. Is it not a desirable thing to get the franchise to operate a railroad in the northwest corner of the city?

A. Not today.

Q. So you only want to limit your answer to "today"?

A. You understand what I mean by "today."

Q. You stated that the cost of construction would be one hundred and seventeen thousand dollars, figured on the basis of underground double-track system.

A. Yes, sir.

Q. Are you familiar with the cost of laying an underground system?

A. Yes, sir.

Q. How much would it cost a mile?

A. From fifty to sixty thousand dollars a mile.

Q. That including a double track?

A. Yes, sir.

Q. Why would it cost one hundred and seventeen thousand dollars to go forty-seven hundred feet?

A. We would have to cross over—cross-over and special work from three to ten thousand dollars.

Q. Your cost in the city per mile is from fifty to sixty thousand dollars. You have one crossing to make at Columbia road and Eighteenth street and you say that may cost you from three to ten thousand dollars——

A. Then we have a curve and cross-over at the other end of the line.

Q. A switch from one track to the other?

A. That is special work.

Q. How great a cost is that?

A. Three thousand dollars.

Q. Taking the maximum price and adding the cost of the switch at the end of the route—how do you account for the difference between the cost of that and one hundred and seventeen thousand dollars?

A. It is within four hundred feet of a mile. That would be one hundred thousand dollars right there. It would cost more if you laid but a single track. That is, a double track would cost less per mile for each track than a single track railroad. Each of these tracks would cost from fifty to sixty thousand dollars.

Q. I understood that fifty thousand dollars would be the cost of constructing a double-track railroad?

A. No; fifty thousand dollars for each track.

Q. That would be the cost in the city?

A. Yes, sir.

Q. For which road did you pay that?

A. That was the average for constructing the Anacostia and Potomac railroad.

Q. Did you have to change from one system to the other?

A. Yes, sir; from horse-car system.
Q. You charged to dig up paved streets?
A. Yes, sir; but we did not strike concrete.
Q. You include that in your estimate of cost?
A. Yes, sir.
Q. In this instance, what will be the cost?
A. Well, it will have to be repaved.
Q. You have referred to the number of passengers a day necessary to meet the operating expenses, which you fix at ten dollars per day per car?
A. Yes, sir.
Q. Twenty dollars for two cars?
A. Yes, sir; we would have to put on two more cars on the whole line to make up this forty-seven hundred feet. We figured that.
16 Q. These two cars would run over the rest of the route?
A. Yes, sir.
Q. So there would be no difficulty in taking up the requisite number of passengers?
A. We cannot count the passengers downtown. If we put on two more cars that would not benefit the company, only increase the expense.

Redirect examination by Mr. DARLINGTON:

Q. You say you proposed to take two cars over this extension?
A. It will take more; all the cars will run over it. It will take two additional cars to keep up service and carry out schedule.
Q. How do you make out this estimate of ten dollars?
A. The cars will run eighteen hours. The expense will amount to two dollars a day per man for eleven hours of work—that is, for the conductor and motorman for one day—that will be four dollars. The cost for two men for running the car the remaining eight hours will be three dollars and a half for the two men; about seven dollars and a half for wages alone. The cost we calculate for the power to run a car is two dollars and a half per day.
Q. What does a car cost?
A. The two cars will cost two thousand or twenty-two hundred dollars each—forty-four hundred dollars for two.
Q. Is the cost of the two cars included in your estimate?
A. No, sir; the one hundred and seventeen thousand dollars is for the track ready to operate.
Q. How long does a car last?
A. That is a very hard thing to say. It depends altogether upon the service. A car in the suburban service would not last as long as a car in the city.
Q. Mr. Brandenburg asked you what your company would like to do about running in this territory. Are you advised as to their views?
A. No, sir.

Recross-examination by Mr. BRANDENBURG:

Q. Is it your purpose to comply with this act of Congress and extend this road?

A. It has been considered, and I can say that it awaits the determination of this commission.

Q. As to whether there is an assessment for benefits or not?

A. Not necessarily that. We have not considered it by details.

Cross-examined by Mr. ROBINSON WHITE:

Q. Would this extension give you an entrance to the Zoological park?

A. No, sir. It will carry us past its Sixteenth Street entrance. The walk from the Sixteenth — entrance is a long one.

Q. You mean the Quarry Street entrance. How far is it?

A. About five or ten minutes' walk.

Q. Do you not know there are a good many people who cut across there and go down that road?

A. And also from Eighteenth street. We serve them now
17 from Eighteenth street and Columbia road, and it will be an additional accommodation to those people without any additional fare to us.

Q. Doesn't that increase your travel?

A. I would not say that it does.

Q. Wouldn't you say that persons now taking the Fourteenth Street line would be more likely to take your line?

A. No, sir.

Q. You take the people that go on Fourteenth street and cut across and go down the Quarry road—wouldn't they take your line in preference to the Fourteenth Street line?

A. Today we are six hundred feet nearer than the Capital Traction or Fourteenth Street line.

Q. I know; but there are a good many people who now take cars over the Fourteenth Street line. I ask you whether these people, if they could get out back there (indicating), they would rather take your line?

A. I believe from what I saw it will not stimulate traffic up there.

Q. Would it give you another entrance at Park avenue?

A. An entrance into Park avenue?

Q. Yes; and from there into the Zoo?

A. I am not familiar with the Zoo entrance there; I cannot say.

Q. And to that large park—the Rock Creek park?

A. I am not familiar with the entrance there. I couldn't *not* see any entrance there. I am not familiar with that entrance.

Q. This is to be a competitive road with the Fourteenth Street road, is it not?

A. Not along the lines which this line runs.

Q. Do you mean to say it would not be for people living out near Park street?

A. There might be some possibility. We would enter into competition with a limited number of people.

Q. Between Sixteenth and Fourteenth street?

A. Except those living very near to Fourteenth street and above a square of it.

Q. In other words, persons living near Sixteenth street would take your line?

A. Yes, sir.

Q. Didn't you ask for this extension last year?

A. Not to my knowledge; not since I have been connected with the road. My first knowledge of it was when it appeared in the *the* papers—after Senator McMillan introduced it.

Q. Then I understand that the railroad company did not solicit this extension while it was in a modified form?

A. Not while I was connected with the company. I know our people, the present management, did not ask for the bill.

Q. Did you not solicit Congress to pass it, incorporating an extension leaving out the assessment of benefits?

A. Not while I was connected with it.

Q. You say that it depends in a large measure whether you would construct this line after the widening of this avenue. You cannot say that it depends upon the amount of assessment?

Mr. DARLINGTON: I object. He cannot be called upon to foresee.

Mr. WIGHT: He has answered it.

A. It will depend upon what the board of directors do. I cannot answer for them.

18 DISTRICT OF COLUMBIA, *ss:*

I, Thomas J. Gorman, on oath say that I reported stenographically the deposition of James B. Lackey before the jury of condemnation in the Columbia road and Sixteenth street widening and extension case, No. 577, District court, and the foregoing is a full, complete, and correct transcript of said deposition.

THOMAS J. GORMAN.

Subscribed and sworn to before me this 23rd day of November, 1900.

RUTLEDGE WILLSON,

[SEAL.] *Notary Public, D. C.*

In the Supreme Court of the District of Columbia.

Filed July 9th, 1901. J. R. Young, Clerk.

In re WIDENING OF COLUMBIA ROAD AND OLD SIXTEENTH STREET.
No. 577, Dist. Court.

Decree of Final Confirmation of Verdict, Award and Assessment.

It appearing to the court that the order *nisi* confirming the verdict, award, and assessment of the jury filed herein has been duly published as therein provided, and that the Metropolitan Railroad Company and the owners of land condemned and the owners of land assessed in said verdict have been duly notified of the pendency of these proceedings, as provided in said order, and it appearing to the court that by a clerical error in said verdict an assessment appears to have been made against lot eighteen [18], in block fourteen [14*], of Meridian Hill subdivision, owned by George T. Dearing, in the sum of one hundred and fifty dollars [$150.00], whereas said assessment was in fact one hundred dollars [$100.00], and should have so appeared, it is this 9th day of July, 1901, by the court adjudged, ordered and decreed that the said verdict, award, and assessment be, and the same hereby is, amended accordingly, so as to show an assessment against said land in the sum of one hundred dollars [$100.00], and argument of counsel upon the exceptions to said verdict filed herein having been heard and considered, it is by this court, this 9th day of July, 1901, further adjudged, ordered, and decreed, upon the motion of the Commissioners of the District of Columbia, that the said exceptions and each of them be, and they are hereby, overruled and the aforesaid verdict, award, and assessment, as amended as aforesaid, be, and the same is hereby, in all respects finally confirmed.

A. B. HAGNER, *Justice.*

And from so much of the above decree as overrules its exceptions and confirms the verdict, award, and assessment against it, the
19 Metropolitan Railroad Company appeals in open court, and the penalty of the appeal bond is fixed by the court at one hundred dollars.

A. B. HAGNER,
Asso. Justice.

Memorandum.

July 22, 1901.—Appeal bond filed.

Stipulation.

Filed Aug. 19, 1901. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia, Sitting as a District Court.

In re WIDENING OF COLUMBIA ROAD AND SIXTEENTH STREET. No. 577.

It is hereby stipulated by and between the parties to the appeal of the Metropolitan Railroad Company against the decree of the court of July 9th, 1901, confirming the verdict, award, and assessment of benefits against the Metropolitan Railroad Company, that the following designated portions of the record shall constitute the transcript of record for the purposes of the appeal of the said Metropolitan Railroad Company in said cause:

1. Petition of Commissioners, filed July 12, 1900.
2. Instructions to jury, August 2, 1900.
3. Answer of Metropolitan R. R. Co., filed August 20, 1900.
4. Instructions offered by Metropolitan R. R. Co. and rejected, filed August 21, 1900.
5. Instructions 1*a* and 1*b* offered by Metropolitan R. R. Co. and rejected, and notice of same, filed Sep. 5, 1900.
6. Instructions 2, 3, and 4 of Metropolitan Railroad Co., granted, filed Sep. 5, 1900.

All instructions granted and excepted to by Metropolitan Railroad Co.

7. Verdict of jury, caption, and conclusion, and part thereof assessing damages against Metropolitan R. R. Co., filed Sep. 27, 1900.
8. Order *nisi* as to omitting recital of contents of verdict, filed Oct. 17, 1900.
9. Exceptions to verdict by Metropolitan Railroad Co., filed Oct. 29, 1900.
10. Motion to confirm, notwithstanding exceptions (omitting affidavit of notice), filed Nov. 23, 1900.
11. Petition of Metropolitan Railroad Co. to make of record certain testimony and allowance of same, filed Nov. 24, 1900.

Motion to vacate order on said petition.

20 12. Decree confirming verdict and endorsement of appeal and fixing penalty of bond, filed July 9, 1901.

Opinion of Justice Hagner, if filed.

A. B. DUVALL,
Att'y, D. C.
J. J. DARLINGTON,
For Met. R. R. Co.

Order Extending Time to File Transcript.

Filed Aug. 29, 1901.

In the Supreme Court of the District of Columbia.

In re THE EXTENSION OF COLUMBIA ROAD AND SIXTEENTH STREET.
No. 577, District Court Docket.

Upon consideration of the motion of the Metropolitan Railroad Company, this day filed, it is by the court, this 29th day of August, A. D. 1901—counsel for the Commissioners of the District of Columbia consenting thereto—ordered that the time for filing the transcript of record in the Court of Appeals by the said Metropolitan Railroad Company be, and the same hereby is, extended for a period of thirty days from the expiration of the time allowed therefor by the rules.

JOB BARNARD,
Associate Justice, S. C. D. C.

O K.
A. B. DUVALL, *Att'y.*

Order Extending Time for Filing Transcript.

Filed Sep. 27, 1901.

In the Supreme Court of the District of Columbia.

In re THE EXTENSION OF COLUMBIA ROAD AND SIXTEENTH STREET.
No. 577, District Docket.

Upon consideration of the motion of the Metropolitan Railroad Company this day filed, it is by the court, this 27th day of September, A. D. 1901, counsel for the Commissioners of the District of Columbia consenting thereto, ordered that the time for filing the transcript of record in the Court of Appeals by the said Metropolitan Railroad Company be, and the same hereby is, extended for the further period of thirty days from the expiration of the time for which it was heretofore extended under order of this court passed on the 29th day of August, 1901.

E. F. BINGHAM,
Chief Justice.

O K.
A. B. DUVALL, *Att'y.*

21 *Order Extending Time for Filing Transcript.*

Filed Nov. 23, 1901.

In the Supreme Court of the District of Columbia.

In the Matter of THE EXTENSION OF SIXTEENTH STREET AND COLUMBIA ROAD. District Court, No. 577.

On oral motion, it is by the court, this 23rd day of November, A. D. 1901, ordered that the time for filing the transcript of record by the Metropolitan Railroad Company on appeal be extended five (5) days from the time now fixed for filing same.

A. B. HAGNER, *Justice.*

I consent.

A. B. DUVALL, *Att'y.*

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 40, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this record, in cause No. 577, district court, *In re* widening of Columbia road and Sixteenth street, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 27th day of November, A. D. 1901.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1147. Metropolitan Railroad Company, appellant, *vs.* Henry B. F. Macfarland *et al.*, Comm'rs, D. C. Court of Appeals, District of Columbia. Filed Nov. 27, 1901. Robert Willett, clerk.

21½ TUESDAY, *December 10th, A. D.* 1901.

METROPOLITAN RAILROAD COMPANY, Appellant,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and LANSING H. Beach, Commissioners of the District of Columbia. } No. 1147.

The expiration of the term of office of Lansing H. Beach, one of the appellees herein, and the appointment of John Biddle as his successor as Commissioner of the District of Columbia, having been suggested, it is upon motion of Mr. A. B. Duvall, of counsel for the appellees, now here ordered by the court that the said John Biddle, Commissioner of the District of Columbia, be, and he is hereby, made a party appellee in this cause.

THURSDAY, *May 15th, A. D.* 1902.

METROPOLITAN RAILROAD COMPANY, Appellant,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and JOHN Biddle, Commissioners of the District of Columbia. } No. 1147.

The argument in the above entitled cause was commenced by Mr. J. J. Darlington attorney for the appellant, and was continued by Messrs. A. H. O'Connor and A. B. Duvall attorneys for the appellees, and by Mr. C. Cole, attorney for the appellant.

22 FRIDAY, *May 16th, A. D.* 1902.

METROPOLITAN RAILROAD COMPANY, Appellant,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and JOHN Biddle, Commissioners of the District of Columbia. } No. 1147.

The argument in the above entitled cause was concluded by Mr. C. C. Cole, attorney for the appellant.

23 METROPOLITAN RAILROAD COMPANY, Appellant
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and JOHN Biddle, Commissioners of the District of Columbia. } No. 1147.

Opinion.

Mr. Chief Justice ALVEY delivered the opinion of the court:

This is an appeal from the decree of the court below sitting as a district court, confirming a special assessment against the appellant, The Metropolitan Railroad Company, in the sum of $25,000, as and

for benefits accruing or that will accrue to the railroad company by reason of the extension and widening of Columbia road and what is known as Old Sixteenth street, in the District of Columbia. The proceedings were instituted by the Commissioners of the District of Columbia, under the act of Congress of June 6, 1900, providing for the widening of Columbia road and what is known as Old Sixteenth street, and the extension of the Metropolitan railroad from its present terminus at Columbia road and Eighteenth street, northwest, along said road and Old Sixteenth street to Park street.

As directed by the act, a jury of seven were impaneled, and thereafter and before concluding upon their verdict, the court was applied to by the appellant to give instructions to the jury to guide them in making up their verdict under the provisions of the statute. Of the several instructions proposed on behalf of the appellant, those which sought to exempt the appellant from all liability to assessment for benefits by reason of the widening and grading the ways mentioned were rejected; but others of such proposed instructions were granted by the court, to wit:

"2. The jury is instructed that it can assess such benefits only against the Metropolitan Railroad Company, if any, as it has been shown by the evidence in the case will result to said company from the extension of Columbia road and present Sixteenth street, as provided in the act of Congress of June 6, 1900.

"3. The jury is instructed that it is not required to assess any part of the amount which it shall award as damages for and in respect of the land condemned in these proceedings against the Metropolitan Railroad Company, and that it is its duty not to do so unless it is satisfied by a fair preponderance of the evidence that the said company will be specially benefited by the proposed extension of Columbia road and the present Sixteenth street, and, in case it shall be so satisfied, it is its duty to assess against the said railroad company only such sum as shall be a fair and reasonable measure of such benefits.

"4. In determining the question whether or not said railroad company will be benefited by the said extension and the extent of such benefit, if any, the jury should consider the cost to which said company will be put in extending its lines from its present terminus, as provided in the act of June 6, 1900, and the increased cost of operating its said lines as shown by the testimony, in connection with such evidence in the case as may tend to establish the fact and amount of such benefits to it."

The jury, under the foregoing instructions, returned their verdict to the court, showing the parcels of land required to be taken for the widening of the streets, and assessing the damages to be paid to the several owners thereof, at the aggregate amount of $181,858, and assessing the benefits at $90,929; and of this latter amount the sum of $25,000 was assessed to be paid by the Metropolitan Railroad Company, as its proportional part of the benefits, and the residue of the aggregate sum assessed for benefits was apportioned against cer-

tain parcels of land owned by various persons, but none of which land assessed was owned by the railroad company.

To this verdict of the jury the appellant filed exceptions, alleging that the verdict was without evidence to support it; that it was against the weight of evidence; and for errors of law in the instructions given, and for error in refusing to grant instructions proposed by the appellant. These exceptions were all overruled by the court, and the verdict of the jury was finally ratified and confirmed; and it is from that order that the appeal is taken.

As the constitutionality of the act of Congress of June 6, 1900, is brought into question, and also some of the provisions of that act are supposed to be of doubtful construction, it would seem best for the clear understanding and determination of those questions, that the provisions of the act so far as they relate to the matters in controversy, be set out in the terms of the act itself. The sections of the act that have a bearing upon the questions involved are the following:

24 "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Metropolitan Railroad Company of the District of Columbia be, and the same is hereby, authorized and required to extend by double tracks the lines of its underground electric railroad from its present terminus at the intersection of Eighteenth street and Columbia road easterly along Columbia road to the present Sixteenth street northwest, thence north along Sixteenth street to Park street: *Provided*, That no cars shall be switched in the streets after the expiration of two years from the passage of this act.

SEC. 2. That before such extension shall be constructed Columbia road shall be widened to *to* a width of one hundred feet, the present Sixteenth street shall be widened to a width of eighty-five feet from Columbia road to Park street, and in such widening the building restriction line on the eastern side of said street shall be taken as far as practicable to form the eastern side of said street when widened; and also sufficient land shall be acquired at the northwesterly corner of Columbia road and Sixteenth street so as to allow the street-railway tracks to be laid wholly without the roadway of Sixteenth street as extended according to the highway extension plans; all in accordance with plans to be prepared by the Commissioners of the District of Columbia; and the said Commissioners shall institute in the supreme court of the District of Columbia, sitting as a district court, by petition, particularly describing the lands to be taken, a proceeding *in rem* to condemn the land that may be necessary for the extension of Columbia road and the present Sixteenth street as herein provided, with a width of one hundred feet: *Provided*, That the said Commissioners are authorized and empowered to locate the lines of the railroad of said company within the area so to be acquired as aforesaid: *And provided further*, That the operation of the cars of the Metropolitan railroad within the Capitol grounds shall be under the control of the architect of the Capitol;

And provided further, That no tracks shall be laid on any portion of the roadway of Sixteenth street as extended according to the highway extension plans.

SEC. 3. That the extensions of the lines of the Metropolitan Railroad Company herein provided for shall be completed and put in operation within one year from the date of the widening of said highways as herein provided, and said company shall deposit with the collector of taxes of the District of Columbia such sums as are necessary to pay the cost of inspection of said work.

SEC. 4. That of the amount found to be due and awarded as damages for and in respect of the land condemned for the extension of Columbia road and the present Sixteenth street, as herein provided, such proportional amounts thereof as the jury hereinafter provided shall determine shall be assessed by said jury as benefits, and to the extent of such benefits, against respectively the Metropolitan Street Railroad Company, and collected as special assessments are collected, and against those pieces or parcels of land on each side of said Columbia road and the present Sixteenth street northwest along those portions of said streets that are to be widened, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia road and the present Sixteenth street northwest as said jury may find said pieces or parcels of land will be benefited; and in determining the amounts to be assessed against said pieces or parcels of land the jury shall take into consideration the respective situations of such pieces or parcels of land and the benefits they may severally receive from the extension of Columbia road as aforesaid: *Provided*, That if the aggregate amount of the benefits to be assessed against those pieces or parcels of land on each side of said Columbia road and the present Sixteenth street northwest along those portions of said streets that are to be widened, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia road and the present Sixteenth street northwest as said jury may find said pieces or parcels of land will be benefited, as determined by said jury pursuant to the provisions hereof, is less than one-half of the amount of the damages awarded for and in respect of the land condemned, the Commissioners of the District of Columbia may, in their discretion, within thirty days after the filing of said award, reject the award and assessment of said jury, and all proceedings hereunder shall be null and void.

SEC. 5. That the said court shall cause public notice of not less than ten days to be given of the filing of said proceedings, by advertisement in such manner as the court shall prescribe, which notice shall worn all persons having any interest in the proceedings to attend court at a day to be named in said notice and to continue in attendance until the court shall have made its final order ratifying and confirming the award of damages and assessment of benefits of the jury; and in addition to such public notice said court, whenever in its judgment it is practicable to do so, may cause a copy of said notice to be served by the marshal of the District of Columbia,

or his deputies, upon such owners of the land to be condemned as may be found by said marshal, or his deputies, within the District of Columbia.

SEC. 6. That after the return of the marshal and the filing of proof of publication of the notice provided for in the preceding section, said court shall cause a jury of seven judicious, disinterested men, not related to any person interested in the proceedings, and not in the service or employment of the District of Columbia or of the United States, to be summoned by the marshal of the District of Columbia, to which jurors said court shall administer an oath or affirmation that they are not interested in any manner in the land to be condemned nor are in any way related to the parties interested therein, and that they will, without favor or partiality, to the best of their judgment, assess the damages each owner of land taken may sustain by reason of the extension of said street and the condemnation of lands for the purposes of such extension, and assess the benefits resulting therefrom as hereinbefore provided. The court, before accepting the jury, shall hear any objections that may be made to any member thereof, and shall have full power to decide upon all such objections, and to excuse any juror or cause any vacancy in the jury, when impaneled, to be filled; and after said jury shall have been organized and shall have viewed the premises, said jury shall proceed, in the presence of the court, if the court shall so direct, or otherwise as the court may direct, to hear and receive such evidence as may be offered or submitted on behalf of the District of Columbia and by any person or persons having any interest in the proceedings for the extension of said street. When the hearing is concluded the jury, or a majority of them, shall return to said court, in writing, its verdict of the amount to be found due and payable as damages sustained by reason of the extension of said street under the provisions thereof, and of the pieces or parcels of land benefited by such extension and the amount of the assessment for such benefits against the same.

SEC. 7. That if the use of a part only of any piece or parcel of ground shall be condemned, the jury, in determining its value, shall not take into consideration any benefits that may accrue to the remainder thereof from the extension of said street or highway, but such benefits shall be considered in determining what assessment shall be made on or against such part of such piece or parcel of land as may not be taken as hereinbefore provided.

SEC. 8. That the court shall have power to hear and determine any objections which may be filed to said verdict or award, and to set aside and vacate the same, in whole or in part, when satisfied that it is unjust or unreasonable, and in such event a new jury shall be summoned, who shall proceed to assess the damages or benefits, as the case may be, in respect of the land as to which the verdict may be vacated, as in the case of the first jury: *Provided*, That if vacated in part, the residue of the verdict and award as to the land condemned or assessed shall not be affected thereby: *And provided fur-*

ther, That the exceptions or objections to the verdict and award shall be filed within thirty days after the return of such verdict and award.

SEC. 9. That when the verdict of said jury shall have been finally ratified and confirmed by the court, as herein provided, the amounts of money awarded and adjudged to be payable for lands taken under the provisions hereof shall be paid to the owners of said land by the Treasurer of the United States, *ex-officio* commissioner of the sinking fund of the District of Columbia, upon the warrant of the Commissioners of said District, out of the revenues of the District of Columbia; and a sufficient sum to pay the amounts of said judgments and awards is hereby appropriated out of the revenues of the District of Columbia.

SEC. 10. That when confirmed by the court the several assessments herein provided to be made shall severally be a lien upon the land assessed, and shall be collected as special improvement taxes in the District of Columbia, and shall be payable in four equal annual installments, with interest at the rate of four per centum per annum from the date of confirmation until paid. That said court may allow amendments in form or substance in any petition, process, record, or proceeding, or in the description of property proposed to be taken, or of property assessed for benefits whenever such amendments will not interfere with the substantial rights of the parties interested, and any such amendment may be made after as well as before the order of judgment confirming the verdict or award aforesaid."

1. The first and principal question raised is that which denies the constitutionality of the act of June 6, 1900, in so far as it requires the appellant, the railroad company, to extend by double tracks the lines of its underground electric railroad from its present terminus along the Columbia road and Sixteenth street to Park street. It is contended that the appellant cannot be compelled to extend its lines without the consent of its board of directors or stockholders; as by compelling the company so to extend the lines of its road without its consent would be taking private property for public or private use without compensation, and without due process of law. If this contention be well founded, it must follow as a necessary consequence that the right to the assessment made against the appellant for benefits that would accrue to it by the widening of the streets along which the extension is required to be made, must fail, and be declared to be without warrant or justification.

But is the act of Congress unconstitutional in the provision that requires the extension of the road? By the charter of the Metropolitan Railroad Company, act of Congress of July 1, 1864, and so in the charters of the companies subsequently embraced by that company, it is expressly declared "that this act may at any time be *altered, amended, or repealed* by the Congress of the United States."

It may be conceded that this reserved power in Congress is not entirely without limit, and that the power to alter, amend, or repeal must be exercised within reasonable bounds for the preservation of right and justice. It has been said by high authority, that the power must not be exercised in such arbitrary way as to destroy vested rights acquired in good faith under the chartered powers of the corporation. But it does not follow that this power to alter or amend may not be exercised to add new duties and obligations to those originally imposed, though such new duties and obligations may require the expenditure of large sums of money in their performance.

The question is, for what purpose was this power of alteration, amendment, and repeal reserved, if not to be exercised to promote the interests of the public, and to meet the requirements of that interest as it may arise? It was certainly not only intended to authorize the making of mere formal changes in the charter, but, as it has been most justly said, one of the most obvious reasons for reserving to the legislature the right to alter, amend or repeal such charters is to enable it to compel un unwilling corporation to perfect and extend its connections with other railroads, or to extend its road to certain localities, as the convenience of the public may from time to time require. Mayor, &c., of Worcester *v.* N. & Worcester Railroad Co., 109 Mass. 103, 113. And especially is this reason applicable, and with much greater force than in ordinary cases of railroads, when invoked in the case of an unwilling
26 street railroad company already in the use and enjoyment of a most valuable and extensive franchise, excluding all other roads from many of the principal streets of the city, and as to those streets constituting a monopoly. If the extension of such road can not be required to the less populous portions of the city, those sections may be entirely deprived of the benefit of street railroad facilities and improvement,—improvement indispensable to the extension and development of a city. Indeed, we may well suppose that it was within the contemplation of all parties concerned, at the time the charter was granted, that the lines of the road should, from time to time, be extended to meet the convenience and need of the public, and to conform to the growth and extension of the city. Legislation to meet such need has been had, upon several occasions, requiring such extension of this road, and without attempted resistance on the part of the corporation. Act of Cong., Aug. 2, 1894, sec. 2 (Stats. 28, p. 217); act of Cong., Feb. 26, 1895 (Stats. 28, p. 682); act of Cong., Feb. 27, 1897 (Stats. 29, p. 600).

It is contended that Congress could not exercise the power of requiring or compelling the extension of the lines of the road, as required in this case, without the consent of the corporation. But to sustain such a contention would simply render the reserved power to Congress to altar, amend, or repeal the charter, nugatory and without effect. The very object of the reservation of the power in the charter was to dispense with the consent of the corporation, and

to retain a power superior to the mere will of the corporation, or those who compose it. Nor can the exercise of such reserved power be construed as impairing the obligation of a contract as between Congress and the corporation. Nor is there the slightest ground for the contention urged by the appellant, that the proceeding in this case, under which the assessment was made against the appellant, deprives the latter of its property without due process of law. Davidson *v.* New Orleans, 96 U. S. 97, 105–6.

There are numerous decisions of the question as to the extent of the legislative power over charters granted subject to the right of alteration, amendment and repeal; but we shall not extend this opinion by citing many of them. In Massachusetts there have been several well-considered cases upon the subject, and which have been cited and approved by decisions of the Supreme Court of the United States. In that State the Revised Statutes contain a provision that every act of incorporation, passed since March 11, 1831, shall at all times be subject to amendment, alteration, or repeal, at the pleasure of the legislature. In the case of Fitchburg Railroad Co. *v.* Grand Junction Railroad Co., 4 Allen, 198, 205, the clause of the Revised Statutes just mentioned was applied to special statutes of 1856, ch. 296, and 1857, ch. 128, which required the Fitchburg, the Grand Junction and the Boston and Lowell railroad corporations, to make expensive changes at their crossings, and to erect a bridge of specified dimensions and materials, and construct a connecting track, and which directed how the work should be superintended, and how the expense should be apportioned. The objection was taken there that the legislature, in the special acts, had transcended its power in requiring the improvements to be made regardless of the consent of the corporations, and their right to control the work. But the court held, that, under the clause of the Revised Statutes, the changes were rightly ordered, and that the legislature might prescribe by whom, in what manner, and under whose supervision the work should be accomplished, and in what proportions, according to their respective interests, it should be paid for by the parties affected by it.

The same principle was reaffirmed and applied in the subsequent case of Commonwealth *v.* Eastern Railroad Co., 103 Mass. 254. In that case, a statute requiring a railroad corporation whose charter was subject to amendment, alteration, or repeal, at the pleasure of the legislature, to establish a flag station at a certain point on its line, and to erect there a station house, at which at least two trains each way should stop each day, was held to be clearly within the power of the legislature, under the reserved power to alter or amend. In the opinion of the court, by Chief Justice Chapman, after referring to the case in 4 Allen, to which we have just referred, it is said: "But, independently of the authority of those cases, it seems to us that the clause was intended to provide for such a case as the present. If the directors of a railroad were to find it for the interest of the stockholders to refuse to carry any freight or passengers ex-

cept such as they might take at one end of the road and carry entirely through to the other end, and were to refuse to establish any way stations, or do any way business for that reason, though the road passed for a long distance through a populous part of the State, this would be a case manifestly requiring and authorizing legislative interference under the clause in question. And on the same ground, if they refused to provide reasonable accommodation for the people of any smaller locality, the legislature may reasonably alter and modify the discretionary power which the charter confers upon the directors, so as to make the duty to provide the accommodation absolute. Whether a reasonable ground for interference is presented in any particular case is for the legislature to determine; and their determination on this point must be conclusive."

That case, with the paragraph from the opinion just quoted, was referred to with approval and adopted by quotation by the Supreme Court of the United States, in the case of Northern Pacific Railroad *v.* Dustin, 142 U. S. 492, 503–4.

In the more recent case of Mayor and Aldermen of Worcester *v.* Norwich and Worcester Railroad Co., 109 Mass. 103, it was held that the right of the legislature to amend, alter, or repeal the charter of a railroad corporation, under the General Statutes, ch. 68, includes authority both to withdraw powers granted to the corporation, and to confer new powers on it, and to require their exercise, and that independently of the assent of the corporation. In that case, the statute required of the defendant corporation, and certain other railroad corporations to unite in the erection of a station in the city of Worcester, for the accommodation of the passenger trains of all said corporations. The act further provided that the
27 station should be located on the northerly side of the main tracks of the Boston and Albany Railroad Company, between Green street and Grafton street, or upon the easterly side of Grafton street, and not more than fifteen hundred feet distant therefrom. The power of the legislature thus to require the railroad corporations to unite in the erection of the station, and to change their tracks, was strongly resisted by the railroad corporations, upon the grounds, that, by discontinuing the locations of the corporations named, and requiring them to locate and construct new railroads not within their existing locations, would interfere with vested rights, impair the obligation of contracts, and appropriate private property to public use without providing compensation therefor; and, consequently, such legislation was unconstitutional and void. But the court held the statute to be constitutional and valid, and to be a reasonable exercise of the power reserved to the legislature to amend, alter, or repeal the charters of the companies. And in the opinion of the court, it is said: "At any rate, the legislature was the exclusive judge as to that matter, and an amendment of the several charters, so as to secure such an object was a reasonable exercise of their reserved right. It is no valid objection to such

amendments, that they require corporations to extend their tracks, and to exercise the right of eminent domain for this purpose, and to incur additional expense. The power to extend their tracks is often granted at their own request; and is granted with no less propriety when the interests of the public require it. The power to alter a charter includes the right to take away some of the powers granted by it, or to add new powers without which improvements of the greatest importance would be *ultra vires*. Their compensation for the outlay is in the tolls they receive from travellers or others."

The decision just cited is quoted with entire approval by the Supreme Court of the United States, in the case of Shields *v.* Ohio, 95 U. S. 319, 325; and the decision in this latter case would seem to be quite sufficient to sustain the validity of the act of Congress of June 6, 1900, in respect to the power to require the extension of the defendant's line of road. And the act of Congress being valid, and creating a specific duty to extend the road of the defendant as prescribed, if that duty is neglected or refused to be performed, it may be enforced by mandamus against the corporation. Northern Pacific Railroad *v.* Dustin, 142 U. S. 492; Union Pacific Railroad *v.* Hall, 91 U. S. 342; New Orleans, etc., Railway Co. *v.* Mississippi, 112 U. S. 12.

2. But notwithstanding the defendant corporation may be required and compelled to extend the line of its road, as prescribed in the act of Congress, it is contended that it is not subject to assessment for benefits, and therefore, the apportionment of the assessments made for benefits to property along the line of the specified extension, as the consequence resulting from the widening of the streets, so far as the defendant corporation is concerned, is absolutely null and void. This contention is founded upon the theory, that because the corporation is not at present the owner of any abutting property along the line of the proposed extension, therefore it can not be legally assessed for benefits to the road to be hereafter extended. But we cannot assent to this proposition.

Instead of requiring the railroad company to acquire and prepare its own right of way along the extension, Congress deemed it best to require that the streets, to the extent of the required extension, should be widened and graded by and under the authority of the Commissioners of the District. This, however, did not relieve the railroad company from an obligation to pay a fair proportion of the expense of widening the streets, the assessment to be apportioned to the benefits that it would receive from the improvement in common with the abutting land owners. This is what is required by the terms of the act of Congress, and we think it but fair and just; and the case would seem to be strictly within the principle of the decision of Fitchburg Railroad Co. *v.* Grand Junction Railroad Co., 4 Allen, 198. It is true, the defendant has no abutting property along the line of the designated extension, but it has a franchise and a right to an easement in the bed of the streets, that

constitute property, and such right may be subject to the assessment for benefits; at any rate, Congress has made it so, and there can be no question of the right of Congress to prescribe such a basis of assessment. It is not upon abutting property, but against the railroad company that the proportional assessment is required to be made, and which has been so made. This proportional assessment, it is true, is directed to be collected as special assessments are collected; but this is not exclusive of all other methods of collection. New Haven *v.* Fair Haven & Westfield Railroad Co., 38 Conn. 422. By the assessment and apportionment of benefits by the jury, and confirmation of the verdict by the court, the right is settled, and the mode of collection is a question of a subordinate character. People *v.* Lawrence, 36 Barb. 131.

It is urged by the appellant that the apportionment of the assessments of benefits by the jury among the abutting land owners and the railroad company was not just and equitable, and therefore should be set aside. But there is nothing in the record to show, and we cannot assume, in the absence of sufficient proof, that the jury have acted recklessly and unjustly, and without regard to the rights of the parties, and the instructions of the court, given them at the instance of the appellant. Those instructions were as favorable as the appellant could reasonably ask, and we have no evidence in the case that the jury did not pay proper regard to them. They viewed the premises, as they were required to do by the statute, and heard such evidence as either party thought proper to offer for their consideration, and their verdict can only be questioned and shown to be unjust or unreasonable, by clear and indubitable evidence.

Finding no error in the rulings of the court below, the order appealed from will be affirmed; *and it is so ordered.*

Order affirmed.

28 WEDNESDAY, *October* 15*th*, *A. D.* 1902.

METROPOLITAN RAILROAD COMPANY, Appellant,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and John Biddle, Commissioners of the District of Columbia.

No. 1147.
October Term, 1902.

Appeal from the supreme court of the District of columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the order of the said supreme court, in this cause, be, and the same is hereby, affirmed, with costs.

Per Mr. CHIEF JUSTICE ALVEY.

October 15, 1902.

FRIDAY, *October 24th, A. D.* 1902.

METROPOLITAN RAILROAD COMPANY, Appellant,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and JOHN Biddle, Commissioners of the District of Columbia. } No. 1147.

On motion of Mr. C. C. Cole, of counsel for the appellant in the above entitled cause, it is ordered by the court that said appellant be allowed an appeal to the Supreme Court of the United States on giving bond to act as supersedeas in the sum of thirty five thousand dollars.

29 In the Court of Appeals of the District of Columbia.

THE METROPOLITAN RAILROAD COMPANY
vs.
HENRY B. F. MACFARLAND and Others. } No. 1147.

And now comes the appellant by C. C. Cole its counsel and shows to the court that because of the fact that the record in this cause contains what may possibly be considered a bill of exceptions it may be that the proper remedy would be held to be a writ of error instead of an appeal to the Supreme Court of the United States. It therefore prays that this honorable court in addition to the appeal which was granted to it to the Supreme Court of the United States in this cause on the 24th day of October 1902, it may also be allowed a writ of error to said court and that the supersedeas bond required upon said appeal may also be taken and accepted as a supersedeas bond upon said writ of error.

C. C. COLE,
Attorney for the Metropolitan Railroad Company.

(Endorsed:) No. 1147. Metropolitan Railroad Co. *vs.* Macfarland & Others. Motion for writ of error in addition to appeal to U. S. Sup. Court. Court of Appeals, District of Columbia. Filed Nov. 18, 1902. Robert Willett, clerk.

30 TUESDAY, *November* 18*th*, *A. D.* 1902.

METROPOLITAN RAILROAD COMPANY, Appellant,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and John Biddle, Commissioners of the District of Columbia. } No. 1147.

Writ of error to remove cause to the Supreme Court of the United States prayed by Mr. Charles C. Cole of counsel for appellant, allowed, and the same bond in the sum of thirty five thousand dollars to act as a supersedeas fixed on the appeal heretofore allowed in this cause, shall stand and act as a supersedeas upon said writ of error.

31 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Metropolitan Railroad Company, appellant and Henry B. F. Macfarland, John W. Ross and John Biddle, Commissioners of the District of Columbia, appellees a manifest error hath happened, to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of November, in the year of our Lord one thousand nine hundred and two.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

32 FRIDAY, *December 5th, A. D.* 1902.

METROPOLITAN RAILROAD COMPANY, Appellant,
vs.
HENRY B. F. MACFARLAND, JOHN W. ROSS, and JOHN Biddle, Commissioners of the District of Columbia. } No. 1147.

It having been suggested to the court that during the pendency of this suit in this court the said John W. Ross departed this life on the 29th day of July 1902, after argument and submission of the cause to the court and that Henry L. West has been appointed his successor as a Commissioner of the District of Columbia, it is ordered that the name of the said Henry L. West be substituted for that of the said John W. Ross as a party to this suit.

By the court:

R. H. ALVEY, *Ch. Justice.*

33 (*Bond on Appeal.*)

Know all men by these presents, that we, the Metropolitan Railroad Company and the Washington Railway and Electric Company successor to Met. R. R. Co., as principals, and Fidelity and Deposit Company of Maryland, a corporation, of Baltimore city, Maryland, as surety, are held and firmly bound unto Henry B. F. Macfarland, Henry L. West and John Biddle, Commissioners of the District of Columbia, in the full and just sum of thirty five thousand dollars, to be paid to the said Henry B. F. Macfarland, Henry L. West and John Biddle, Commissioners as aforesaid, their certain attorney-, executors, administrators, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of December, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said court, between the Metropolitan Railroad Company and the said Henry B. F. Macfarland, Henry L. West and John Biddle Commissioners as aforesaid, a *a* judgment or decree was rendered against the said Metropolitan Railroad Company and the said Metropolitan Railroad Company having prayed and obtained an appeal and also a writ of error to the Supreme Court of the United States to reverse the decree or judgment in the aforesaid suit, and a citation directed to the said Henry B. F. Macfarland, Henry L. West and John Biddle, Commissioners as aforesaid, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, that if the said Metropolitan Railroad Company shall prosecute said appeal and writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of Metropolitan Railroad Company.]

METROPOLITAN RAILROAD COMPANY,
By GEO. H. HARRIES, *Vice President.* [SEAL.]

[Seal of Washington — & Electric Company.]

WASHINGTON RAILWAY AND ELECTRIC CO.,
By GEO. H. HARRIES, *Vice President.* [SEAL.]

[Seal of Fidelity & Deposit Co. of Maryland.]

FIDELITY & DEPOSIT CO. OF MARYLAND,
By W. H. RONSAVILLE, *Attorney-in-fact.* [SEAL.]

Sealed and delivered in presence of—

JAS. B. LASKEY, *Secretary.*
JAMES T. HANEY.

Approved by—
R. H. ALVEY,
Chief Justice Court of Appeals of the District of Columbia.

O K.
A. B. D., *Att'y D. C.*

[Endorsed:] No. 1147. Metropolitan Railroad Company *vs.* Henry B. F. Macfarland *et al.*, Commissioners D. C. Supersedeas bond on writ of error and appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Dec. 12, 1902. Robert Willett, clerk.

34 UNITED STATES OF AMERICA, *ss:*

To Henry B. F. Macfarland, Henry L. West, and John Biddle, Commissioners of the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District Columbia, wherein Metropolitan Railroad Company is appellant, and you are appellees, to show cause, if any there be, why the decree rendered

against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 12th day of December, in year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted Dec. 12, 1902,

A. B. DUVALL,
For Appellees.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec. 12, 1902. Robert Willett, clerk.

35 UNITED STATES OF AMERICA, *ss:*

To Henry B. F. Macfarland, Henry L. West, and John Biddle, Commissioners of the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Metropolitan Railroad Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 12th day of December, in the year of our Lord one thousand nine hundred and two.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted Dec. 12, 1902.

A. B. DUVALL,
For Def'ts in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec. 12, 1902. Robert Willett, clerk.

36 Court of Appeals of the District of Columbia.

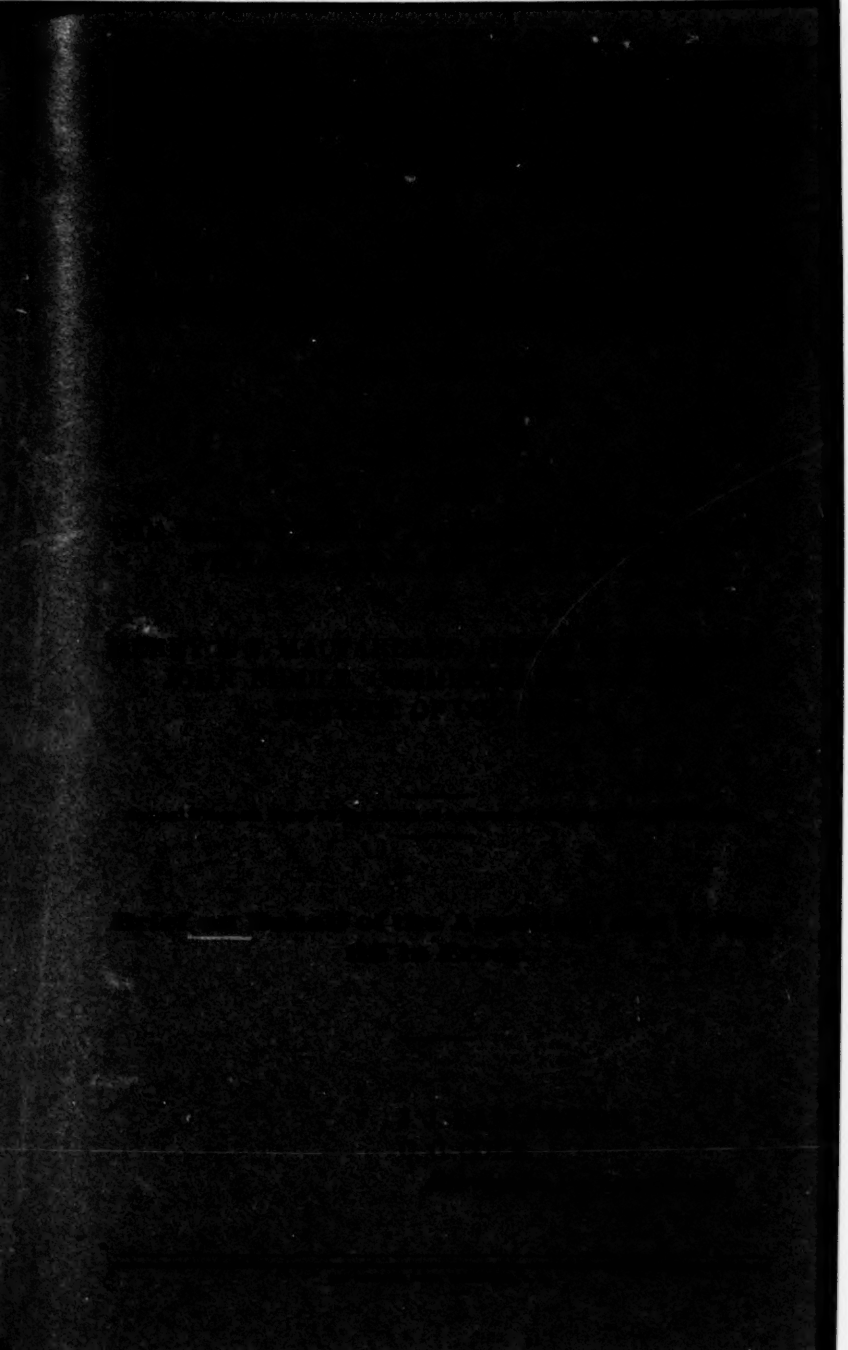
I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 35, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Metropolitan Railroad Company, appellant, *vs.* Henry B. F. Macfarland, Henry L. West and John Biddle, Commissioners of the District of Columbia, No. 1147, October term, 1902, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 20th day of December, A. D. 1902.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,778. District of Columbia Court of Appeals. Term No. 186. Metropolitan Railroad Company, appellant & plaintiff in error, *vs.* Henry B. F. Macfarland, Henry L. West, and John Biddle, Commissioners of the District of Columbia. Filed January 8″, 1903.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 16.

THE METROPOLITAN RAILROAD COMPANY, APPELLANT AND PLAINTIFF IN ERROR,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, AND JOHN BIDDLE, COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

Appeal From or Error to the Court of Appeals of the District of Columbia.

Brief on Behalf of the Appellant and Plaintiff in Error.

Statement.

This is an appeal from, and writ of error to, the judgment of the Court of Appeals of the District of Columbia, affirming the judgment of the Supreme Court of the District of Columbia, confirming the verdict of a special jury of seven, making a special assessment against the appellant in the sum of twenty-five thousand dollars ($25,000) for supposed benefits to accrue to it from being required to extend its line of road.

The proceeding which resulted in such assessment was provided for by act of Congress approved June 6, 1900. The parts whereof material to the questions presented by the record in this cause, are as follows: (31 Stat. p. 668)

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Metropolitan Railroad Company of the District of Columbia be, and the same is hereby, authorized and required to extend by double tracks the lines of its underground electric railroad from its present terminus at the intersection of Eighteenth street and Columbia road easterly along Columbia road to the present Sixteenth street northwest, thence north along Sixteenth street to Park street: *Provided*, That no cars shall be switched in the streets after the expiration of two years from the passage of this act.
>
> "SEC. 2. That before such extension shall be constructed Columbia road shall be widened to a width of one hundred feet, the present Sixteenth street shall be widened to a width of eighty-five feet from Columbia road to Park street, and in such widening the building restriction line on the eastern side of said street shall be taken as far as practicable to form the eastern side of said street when widened; and also sufficient land shall be acquired at the northwesterly corner of Columbia road and Sixteenth street so as to allow the street railway tracks to be laid wholly without the roadway of Sixteenth street as extended according to the highway extension plans; all in accordance with plans to be prepared by the Commissioners of the District of Columbia; and the said Commissioners shall institute in the Supreme Court of the District of Columbia, sitting as a district court, by petition, particularly describing the lands to be taken, a proceeding in rem to condemn the land that may be necessary for the extension of Columbia road and the present Sixteenth street as herein provided, with a width of one hundred feet: *Provided*, That the said Commissioners are authorized and empowered to locate the lines

of the railroad of said company within the area so to be acquired as aforesaid: *And provided further*, That the operation of the cars of the Metropolitan railroad within the capitol grounds shall be under the control of the architect of the capitol: *And provided further*, That no tracks shall be laid on any portion of the roadway of Sixteenth street as extended according to the highway extension plans.

"SEC. 3. That the extensions of the lines of the Metropolitan Railroad Company herein provided for shall be completed and put in operation within one year from the date of the widening of said highways as herein provided, and said company shall deposit with the collector of taxes of the District of Columbia such sums as are necessary to pay the cost of inspection of said work.

"SEC. 4. That of the amount found to be due and awarded as damages for and in respect of the land condemned for the extension of Columbia road and the present Sixteenth street, as herein provided, such proportional amounts thereof as the jury hereinafter provided shall determine shall be assessed by said jury as benefits, and to the extent of such benefits, against respectively the Metropolitan Street Railroad Company, and collected as special assessments are collected, and against those pieces or parcels of land on each side of said Columbia road and the present Sixteenth street northwest along those portions of said streets that are to be widened, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia road and the present Sixteenth street northwest as said jury may find said pieces or parcels of land will be benefited; and in determining the amounts to be assessed against said pieces or parcels of land the jury shall take into consideration the respective situations of such pieces or parcels of land and the benefits they may severally receive from the extension of Columbia road as aforesaid: *Provided*, That if the aggregate amount of the benefits to be assessed against those pieces or parcels of land on each side of said Columbia road and the present Sixteenth street northwest along those portions of said streets that are to be widened,

and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia road and the present Sixteenth street northwest as said jury may find said pieces or parcels of land will be benefited, as determined by said jury pursuant to the provisions hereof, is less than one-half of the amount of the damages awarded for and in respect of the land condemned, the Commissioners of the District of Columbia may, in their discretion, within thirty days after the filing of said award, reject the award and assessment of said jury, and all proceedings hereunder shall be null and void."

The fifth section provides that notice of the proceeding shall be given to all persons interested.

The first part of the sixth section provides for impanneling the jury of condemnation, prescribes the oath to be administered to its members, and then proceeds:

"And after said jury shall have been organized and shall have viewed the premises, said jury shall proceed, in the presence of the court, if the court shall so direct, or otherwise, as the court may direct, to hear and receive such evidence as may be offered or submitted on behalf of the District of Columbia and by any person or persons having an interest in the proceedings for the extension of said street. When the hearing is concluded the jury, or a majority of them, shall return to said court, in writing, its verdict of the amount to be found due and payable as damages sustained by reason of the extension of said street under the provisions hereof, and of the pieces or parcels of land benefited by such extension and the amount of the assessment for such benefits against the same."

The seventh section provides that benefits shall not be set off against damages.

The eighth section is as follows:

"Sec. 8. That the court shall have power to hear and determine any objections which may be filed to

> said verdict or award, and to set aside and vacate the same, in whole or in part, when satisfied that it is unjust or unreasonable, and in such event a new jury shall be summoned, who shall proceed to assess the damages or benefits, as the case may be, in respect of the land as to which the verdict may be vacated, as in the case of the first jury: Provided, That if vacated in part, the residue of the verdict and award as to the land condemned or assessed shall not be affected thereby: And provided further, That the exceptions or objections to the verdict and award shall be filed within thirty days after the return of such verdict and award."

The ninth section provides for the payment of the damages to the parties entitled.

The first part of the tenth section is as follows:

> "That when confirmed by the court the several assessments herein provided to be made shall severally be a lien upon the land assessed, and shall be collected as special improvement taxes in the District of Columbia, and shall be payable in four equal annual instalments, with interest at the rate of four per centum per annum from the date of confirmation until paid."

The residue of the tenth section relates to amendments.

The eleventh and twelfth sections relate to the costs of the proceeding.

The thirteenth section provides that an appeal by one party shall not stay proceedings as to others.

The fourteenth section reserves the right to alter, amend, or repeal.

Pursuant to said act the appellees filed their petition in the Supreme Court of the District of Columbia on the 12th day of July, 1900 (Rec. pp. 1 to 3 inc.).

Notice having been given as required by the act, and a jury properly summoned by the marshal, the trial court, on the 2d day of August, 1900, organized the jury and entered

an order requiring them to view the premises, and thereafter, out of the presence of the court, and from time to time as they might determine, to hear and receive such evidence as might be offered or submitted to them on behalf of the District of Columbia, or any person or persons having any interest in the said proceedings, and at the conclusion of their hearings to return their verdict, in writing, to the court (Rec. p. 4).

On the 20th of August, 1900, the appellant filed its answer to said petition, alleging that it was not the owner of any real estate or other property whatsoever, either abutting upon or adjacent to either of the streets to be widened and improved, and it had not requested the passage of said act authorizing and requiring it to extend its line; that the same was unconstitutional, illegal, and void as to it; that it would not be benefited by such extension of its line and improvement of the streets; that any and all supposed benefits to it therefrom were speculative, and that the said act of Congress, and the proceedings in pursuance thereof, were wholly nugatory and void as to it, and prayed that the court would instruct the jury that no part of the cost of any lands which might be condemned in said proceeding could be assessed against it (Rec. p. 5).

The jury proceeded to take evidence in accordance with the order of the court, and on the 24th of August, 1900, took the deposition of James B. Lackey, which was offered on behalf of the railroad company, and his deposition was the only evidence taken or submitted to the jury upon the question of benefits to the railroad company. Mr. Lackey is the secretary of the appellant, and it appears by his deposition that he has had considerable experience in the construction and operation of the underground electric system for the propulsion of cars in the city of Washington, and knows the cost thereof; that the length of the extension of the appellant's road required by said act is about forty-seven hundred feet; that the construction of the road for that dis-

tance would cost about one hundred and seventeen thousand dollars ($117,000); that to operate the said extension, after its construction, in connection with the other parts of the road would increase the operating expenses about eight thousand dollars ($8,000) per annum; that this sum added to the interest upon the one hundred and seventeen thousand dollars ($117,000), cost of construction, would increase the annual fixed charges of the company about fourteen thousand dollars ($14,000) per annum; that in order to cover this additional expense at the rate of fare fixed by law would require about nine hundred (900) additional passengers per day, and that the extension would have no tendency to increase the number of passengers in the immediate future to any considerable extent, and that it would be impossible to tell how soon, if at all, there would be an increase of receipts from the extension sufficient to pay the increased expenses. He also testified that the company made no effort to have the law passed, but opposed it, on the ground that the time had not arrived for such extension (see Lackey's deposition, pp. 14 to 20, inclusive). Neither the District of Columbia, nor any of the property holders, offered any evidence before the jury upon the question of the expense to the appellant in extending its road and operating the extension, or upon the question of benefits, if any, to result to it therefrom.

On the 5th day of September, 1900, before the jury had returned its verdict, counsel for the appellant prayed the court to grant the following instructions:

> "1a. The jury is instructed that no benefits can be assessed by it against the Metropolitan Railroad Company as such, but that it can assess benefits only against such property of said company, if any, as it shall find will be benefited by the proposed widening and extension of Sixteenth St. and Columbia road, and to the extent, if any, to which it shall find such property will be benefited by such widening and extension, just as in the case of the property of

other owners which it may find will be so benefited.

"Refused, and exception by Mr. Darlington.

"1b. The jury is instructed that under the evidence in this case it can make no assessment of benefits against the Metropolitan Railroad Company.

"Refused, and exception by Darlington.

"2. The jury is instructed that it can assess such benefits only against the Metropolitan Railroad Company, if any, as it has been shown by the evidence in the case will result to said company from the extension of Columbia road and present Sixteenth street, as provided in the act of Congress approved June 6th, 1900.

"Granted, and exception by D. C. and also by G. F. Williams on behalf of certain property owners.

"3. The jury is instructed that it is not required to assess any part of the amount which it shall award as damages for and in respect of the land condemned in these proceedings against the Metropolitan Railroad Company, and that it is its duty not to do so unless it is satisfied by a fair preponderance of the evidence that the said company will be specially benefited by the proposed extension of Columbia road and the present Sixteenth street, and, in case it shall be so satisfied, it is its duty to assess against the said railroad company only such sum as shall be a fair and reasonable measure of such benefits.

"Granted, and exception by D. C. and also by G. F. Williams on behalf of certain property owners.

"4. In determining the question whether or not said railroad company will be benefited by the said extension, and the extent of such benefit, if any, the jury should consider the cost to which said company will be put in extending its lines from its present terminus, as provided in the act of June 6, 1900, and the increased cost of operating its said lines, as shown by the testimony in connection with such evidence in the case as may tend to establish the fact and amount of such benefits to it.

"Granted, and exception taken by D. C. and also by G. F. Williams on behalf of certain property owners."

The court declined to grant the instructions marked 1a and 1b, and separate exceptions were taken to its action in that regard by appellant. Instructions numbered 2, 3, and 4 were granted, and exception was taken thereto by the District and some of the property owners."

On the 27th of September, 1900, the jury returned its verdict, in writing, into court, by which it awarded as damages to the owners of the land to be taken in widening the streets the sum of one hundred and eighty-one thousand eight hundred and fifty-eight dollars ($181,858), and assessed as benefits against the land abutting on said streets that would be benefited thereby the sum of ninety thousand nine hundred and twenty-nine dollars ($90,929) as benefits, and against the appellant the sum of twenty-five thousand dollars ($25,000) as benefits (Rec. pp. 8 and 9).

On the 29th of October, 1900, the appellant filed its exceptions to the finding of said jury, as follows:

> "1. That the said finding, assessment, and award are without evidence to support the same.
>
> "2. That the said finding, assessment, and award are contrary to the evidence.
>
> "3. That the said finding, assessment, and award are contrary to the weight of the evidence.
>
> "4. For errors of law in the instructions given and refused by the court to the jury over the objection and exception of the Metropolitan Railroad Company before the said finding, assessment, and award were made, as shown by the record of the said cause" (Rec. p. 10).

On the 28th day of November, 1900, the appellant, in order to enable the court to pass upon its exception that the verdict of the jury was without evidence to support it, the testimony having been taken out of the presence of the judge, filed its petition, supported by the affidavits of its secretary, of the stenographer who reported the testimony, and of a member of the bar who had been present at all the hearings before the jury, setting out the fact that the only

witness upon the question of benefits to the appellant was James B. Lackey, that the transcript of his testimony annexed to the petition was a full, complete, and correct transcript thereof, and praying that the same might be filed as a part of the record, the same being essential to the determination of its exceptions, which petition was accordingly filed by order of the court (Rec. pp. 12, 13).

On the 9th of July, 1901, after argument of said exceptions, the Supreme Court of the District passed its final decree, confirming said verdict, award, and assessment, from which the appellant appealed to the Court of Appeals of the District (Rec. p. 21).

The case was argued and submitted to the last mentioned court on May 16, 1902 (Rec. p. 25), and on October 15, 1902, that court rendered its opinion and entered its final decree in the cause, affirming the decree of the Supreme Court of the District (Rec. pp. 25 to 35, both inclusive).

Thereupon the appellant appealed to this court and also sued out a writ of error from this court to remove the cause here (Rec. pp. 36 and 37).

Assignment of Errors.

The court below erred in sustaining the trial court:

1st. *In refusing to set aside the assessment because not supported by the evidence, and because contrary to the same and the weight thereof.*

2d. *In refusing to instruct the jury that no assessment could be made against it as a corporation, but only against such of its property, if any, as might be benefited.*

3d. *In refusing to instruct the jury that no assessment of benefits could be made against appellant.*

Questions to be Argued.

The foregoing statement and assignment of errors give rise to the following propositions to be considered:

1st. *The evidence fails to show any benefit to appellant, but*

rather a damage, and the enforcement of the assessment would be the taking of private property for public use without compensation.

2d. *The proceeding as conducted was not due process of law, and the collection of said assessment would be depriving the appellant of its property without due process of law.*

3d. *No personal liability can be imposed by special assessment, but only a lien upon tangible property benefited by the improvement.*

4th. *Congress had no power without the assent of the appellant to require it to extend its road.*

ARGUMENT.

A preliminary question is raised by an objection which was urged below, though not referred to in the opinion of the court—namely, that in proceedings like the present, in which the evidence is taken before a jury, out of the presence of the court, it can not be made a part of the record, and, accordingly, the proposition here contended for, that the verdict is without evidence to support it, is eliminated and can not be submitted to or passed upon by the court.

The right of eminent domain is not a right in equity, nor a creature of statute, but a common law right; and a proceeding like that in the case at bar, to take land for public use by condemnation, is a "suit."

Kohl *vs.* United States, 91 U. S. 367, 375.
Searl *vs.* School District, 124 U. S.197, 199.
Chappel *vs.* United States, 160, 499, 513.

If, therefore, the above objection is maintainable, such suits constitute an exception to the constitutional provision, and, in them, persons may be deprived of their property by arbitrary verdicts of juries, wholly unsupported by evidence.

> "A finding of fact, without evidence to support it, has always been regarded as a ruling upon a question of law, and, if excepted to, presented a legal question reviewable in this court."
>
> Halpine *vs.* Phœnix Insurance Company, 188 N. Y. 165, 170.
>
> Daniels *vs.* Smith, 130 N. Y. 696.

The authorities relied upon below in support of the objection, were—

> Lessor of Fisher *vs.* Cockerell, 5 Pet. 248, 253–4.
>
> Suydam *vs.* Williamson et al., 20 How. 427.
>
> Railroad Company *vs.* Sixth Presbyterian Church, 91 U. S. 127, 130.

The first of these cases was error in ejectment, in which it was sought to make a certain document a part of the record for consideration in the appellate court by a certificate of the clerk that they had been read in evidence at the trial. The court held that the certificate of the clerk was unauthorized, and that, in cases at common law—

> "the course of the court has been uniform not to consider any paper as part of the record which is not made so by the pleadings, or by some opinion of the court referring to it. . . . The appellate court can not know what evidence was given to the jury, unless it be spread on the record in proper legal manner."

Suydam *vs.* Williamson was, also, error in ejectment, tried in the usual way before a jury in the presence of the court, and in which, accordingly, there was no obstacle to presenting the exceptions of the losing party in the ordinary manner. And the court, evidently having in mind trials of the ordinary character, in which those methods are available, after mentioning bills of exceptions, special verdicts, demurrers to the evidence, oyer, agreed cases and the like, de-

clares: "There are no others which can be recognized by this court in cases where the proceedings are required to be in the course of the common law."

In Railroad Company *vs.* The Sixth Presbyterian Church, the hearing had been in a manner somewhat analogous to that in the present case, except that it was had before a jury, presided over by a justice of the peace, whose rulings upon the admission of evidence it was desired to have the court review, not upon a bill of exceptions, or other proceedings to which the justice or the court was a party, but by mere ex parte affidavits, purporting to state the rulings objected to, and filed on behalf of the railroad company without the concurence or action of the court. And it was upon a case of this character, presenting no difficulty or obstacle to making the exceptions a part of the record in the usual way, that this court declared an agreed statement of facts, a bill of exceptions, a special verdict, or a demurrer to the evidence the only ways in which matters of parol evidence can be made a part of the record, "so as to become re-examinable in a court of errors."

> "Exceptions may be taken by the opposite party to the introduction of depositions or affidavits; and the party introducing such evidence in a subordinate court may insist that the court shall give due effect to the evidence, and, in cases of refusal to comply with such request, may except to the ruling of the court, if it be one prejudicial to his rights. Where neither party excepts to the ruling of the court, either in respect to its admissibility or legal effect, the fact that such a deposition or affidavit is exhibited in the transcript is not of the slightest importance in the appellate court, as nothing of the kind can ever constitute the proper foundation for an assignment or error (citations). Errors apparent in the record itself are open to revision, whether the error be made to appear by bills of exceptions or in any other legal manner."

And the court continues:

> "Doubtless other modes may be devised of accomplishing a revision of the legal questions in a case like the present; but the court does not find it necessary to pursue the inquiry, as all the court intends to decide is that the affidavits in the transcript are not a part of the record, and that in such a case an assignment of errors, such as the one exhibited in this case, so far as the same depends on the affidavits, presents no question for re-examination by this court."

In this last case, therefore, the court expressly recognizes the fact that, in cases like the one then, and now, before it, other modes may be devised of accomplishing a revision of the legal questions presented, and holds only that, in such a case, affidavits such as were there offered, namely, affidavits presenting no other ground for admission into the record than the fact that one of the parties had filed them in the clerk's office, could not be considered.

In Russell vs. Ely, 2 Black 575, 580, which was also a question of ejectment, the court say:

> "What purports to be the entire deposition of Baker is sent up by the clerk of the district court, and is printed in the record before us, and, if properly before us, might sustain the exception. But this deposition is not incorporated into the bill of exceptions, nor so referred to in it as to be made a part of the record of the case. It is only a useless encumbrance of the transcript, and an expense to the litigating parties."

It is respectfully submitted that the facts of the present case exclude it from the rulings of the court in those above cited, and at the same time bring it within the principles there laid down. Here, the petition, with its annexed transcript of the deposition and the affidavits showing it to be a full, complete, and true transcript of all the testimony before the jury on the question of benefits to the railroad, and filed in the cause by the court's order, is in effect a part

of the pleadings, and at all events is commonly a part of the record of the case. In the lower court, though the fact does not and could not appear of record, the evidence was discussed by the learned justice who confirmed the award on the ground that, under it and in connection with their "view," the jury had evidence sufficient to sustain their benefit assessment against the appellant; and, in the Court of Appeals, the opinion declares that the jury "heard such evidence as either party thought proper to offer for their consideration," the only evidence of which fact being the deposition and affidavits which, it is objected, are no part of the record.

We respectfully submit that, especially when considered in the light of the circumstances of the case, and of the impossibility of pursuing the course usually followed when the evidence is taken in the presence of the court, the exception of the appellant, with its petition setting forth the whole of the testimony upon the question in issue, certified in the only manner in which certification was possible, under an order of the court signed by the presiding justice, and uncontroverted by the opposing party, is in every legal and essential particular a bill of exceptions.

In Rosenthal *vs.* Ehrlicher *et al.*, 154 Pa. St. 590, the court say:

> "When the stenographer's notes are completed in this manner they present a faithful transcript of all that occurred on the trial, and they show in their proper connection all that formerly went to make up a bill of exceptions. They take the place of the minutes of the trial formerly kept by the judge or under his direction, and the bills of exceptions formerly written out at the trial. These notes, however, do not become a part of the record because the stenographer certifies as to their accuracy, but they are made a part of the record by order of the court that they be written out and filed. When so filed they place upon the record a complete bill of exceptions upon every question on which an exception

> was in fact taken. Nothing could be simpler in practice. Nothing could be fairer to the judge or to the party litigant. The entire trial is literally photographed upon the record. Under such circumstances it would be a waste of time and of legal formalities to settle a bill of exceptions under the old practice. The bill is already settled and is on the record when the stenographer's notes are filed under the direction of the court, and they may be copied therefrom and printed without further ceremony by an appellant."

In Sargeant *vs.* the Bank of Indiana, 12 How. 371, 384, the court say:

> "The mere fact of a paper being found among the files of a cause does not of itself constitute it a part of the record of the cause. In order to render it a part of the record it should form some part of the pleadings in the cause, or be brought under and engrafted upon the action of the court by some motion from the parties."

This is precisely what was done in the case now before the court.

In England *vs.* Gebhardt, 112 U. S. 502, 505, the court say:

> "The mere fact that a paper is found among the files of a cause does not of itself make it a part of the record. If not a part of the pleadings or process in the cause it must be put into the record by some action of the court (citations.) This may be generally by bill of exceptions, or something which is equivalent."

In Bronson *vs.* Shulten, 104 U. S. 410, 413, the fact that an order referred to a motion and annexed affidavits was held to be sufficient to have them considered as part of the record. In the case at bar the deposition is made a part of the record by an order of the court which expressly directs it to be filed in the cause.

Not only, it is submitted, is the petition and annexed deposition a part of the record, but, under the decisions of this court, it is a bill of exceptions, or entitled to be so considered, under the facts and circumstances of this case.

In Parsons *vs.* Armor et al., 3 Pet. 413, 424, in which case the obstacle to a formal bill of exceptions was no greater than in the case at bar, the court held that, under its circumstances, although the writ did not bring up the mere statement of facts but a mass of testimony, it might, under the circumstances of the case, be treated as a bill of exceptions.

And in Hyde et al. *vs.* Booraem et al., 16 Pet. 169, 176, which was also error, the record in lieu of a formal bill of exceptions contained the whole evidence at large, which this court held might be treated as a bill of exceptions, not to determine whether the court rightly interpreted the evidence or drew right conclusions from it, but, as in the case at bar, to determine whether, upon the whole evidence, there being no conflict in it, the judgment can be maintained; or, in other words, whether the evidence was sufficient in law to support the verdict.

In Morse *vs.* Evans, 6 How. Pr. 445, in which case the trial judge had died before the bill of exceptions had been settled, it is held that the case might be presented upon affidavits.

In Insurance Co. *vs.* Boon, 95 U. S. 117, 126, the court said:

> "It is familiar doctrine that courts always have jurisdiction over their records to make them conform to what was actually done at the time. . . . Ordinarily, there must be something to amend by, but that may be the judge's minutes or notes, not themselves records, or anything that satisfactorily shows what the truth was."

In no case could the truth "as to what was actually done

at the time" be more satisfactorily shown than in the case at bar.

Assuming, then, that the preliminary objection in question is not maintainable, we proceed to the merits of the case.

FIRST.

The Evidence and Surrounding Circumstances Not Only Fail to Show That the Appellant Would be Benefited by the Improvement in Question, But Shows Positively That It Would be Damaged Thereby.

The question of whether property may be charged with an assessment which is not actually, but only theoretically, benefited by a local improvement, or whether it may be thereby charged in excess of actual benefits, does not arise in this case. There has been no determination by the legislature that any property, or the railroad company, would be benefited by the improvement. The question of whether any benefits would accrue is submitted by the act to the judgment of the court and jury.

The language of the act is that, of the amount found to be due and awarded as damages for the land condemned—

> "such proportional amounts thereof as the jury hereinafter provided shall determine, shall be assessed by said jury as benefits and to the extent of such benefits against respectively the Metropolitan Street Railroad Company, and collected as special assessments are collected, and against those pieces or parcels of land on each side of said Columbia road and the present Sixteenth street northwest along those portions of said streets that are to be widened, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia road and the present Sixteenth street northwest as said jury may find said pieces or parcels of land will be benefited; and in determining the amounts to be assessed against said pieces or parcels of land, the jury

> shall take into consideration the respective situations of such pieces or parcels of land and the benefits they may severally receive from the extension of Columbia road as aforesaid,"

showing the clear intent of Congress that no assessment should be made in excess of the autual benefits to accrue.

The case of Norwood *vs.* Baker, 172 U. S. 269, had been then recently decided by this court, and the act of Congress in question adopted and followed the principle therein announced.

There can be no contention but that the only evidence produced before the jury not only proved conclusively that the appellant would not be benefited by the improvement, but that, if it extended its road in accordance with the requirement of the statute, it would actually be damaged. There was no evidence introduced to contradict that given by Mr. Lackey, who was a competent and well-informed witness. It is contended on behalf of the District that the jury had the right to view the premises, and to take into consideration the situation and surrounding circumstances. It is not denied that they might properly do that in connection with other evidence. In a case where the question is as to benefits accruing to particular lands or parcels of real estate from an improvement, such view may be of great service to the jury in reaching a correct conclusion, but, even in such cases, the jury is not authorized, and will not be permitted by the court, to let its own view of the premises outweigh controlling evidence in the case. The jury has no right to ignore the sworn evidence and base their conclusions upon the view of the premises. It is only where the evidence conflicts that the jury may use its view of the premises to settle the controversy.

Thompson on Trials, sec. 895.
Lewis on Eminent Domain, sec. 425.
Shoemaker *vs.* United States, 147 U. S. 303, 305–306.

Washburn *vs.* Milwaukee, etc., R. R. Co., 59 Wisc. 364
Atchison, Topeka, etc., R. R. *vs.* Schneider, 127 Ill. 144.
Taflin *vs.* Chicago, etc., R. R., 33 Fed. R. 415.
Grand Rapids *vs.* Perkins, 78 Mich. 93.
Kansas City *vs.* Baird, 98 Mo. 215.
Munkevitz *vs.* C. M. & St. P. R. R., 84 Wis. 403.
Fowler *vs.* R. R. Co., 132 Pa. St. 524.
Clase *vs.* Sawn, 27 Iowa, 503.
7 Encl. Pl. & Pr., p. 581, and authorities cited.

In A. T. & S. F. R. R. Co. *vs.* Schneider, 127 Ill. 144, the court, in speaking of the effect of a view of the premises as evidence, said:

> "The verdict of the jury is not only contrary to the weight of the testimony, but manifestly against all the evidence, and this is not denied or controverted by counsel for appellees. It seems, however, that it was sustained below, on the theory that the jury might legally base its report as to the amount of compensation to be paid, on their personal examination of the premises, without regard to the testimony of witnesses, and this view is now urged in support of the judgment below, and is thought to be sustained by decisions of this court. While it is true that we have frequently held that the personal examination by the jury in such cases is in the nature of evidence, and is to be considered by them in connection with all other evidence in the case, and that an assessment will not be set aside merely because it may differ in amount from the preponderance of the evidence appearing in the record, it has not been held by this or any other court, so far as we are aware, that all the evidence may be ignored, and the amount fixed directly contrary thereto" (127 Ill. 149).

In the case in the 33 Fed. Rep. 415, Judge Dyer, in charging the jury, said:

> "You have been permitted to view the premises in question. The object of this view was to acquaint

you with the physical situation, condition, and surroundings of the premises, and to enable you better to understand the evidence on the trial. The knowledge which you acquired by the view may be used by you in determining the weight of conflicting testimony respecting value and damage, but no further. Your final conclusion must rest on the evidence here adduced" (33 Fed. Rep. 424).

In Flower *vs.* Baltimore, etc., R. R. Co., 132 Pa. St. 524, the question of the effect of a view was the only question in the case, and the court said:

> "There is but a single assignment of error in this case, and that is to the charge of the court. It appears that the jury viewed the premises in dispute, and was subsequently instructed by the court that they could not 'render a verdict upon their own judgment from that view,' but that 'after you have weighed all the evidence, aided by your own view of the premises, you are to give the plaintiff just, full, and fair compensation for the lands this railroad company has taken, and for the injury to the remaining ground if you find it injured.' The learned judge further said: 'You are only permitted to view the land that you may the better understand the testimony. The value of the land you are to ascertain from the witnesses.'
>
> "We see no error in this. The jurors were sworn to render a true verdict according to the evidence. It was never intended that the view of the jury should be substituted for the evidence, and that they should make up their verdict from the view in disregard thereof. The object of the view is, as was correctly said by the learned judge, to enable them the better to understand the testimony; to weigh conflicting testimony, and, thus aided, to arrive at a sound and just conclusion. Controlled by these principles, the view of a jury may often be of great service in such cases. (132 Pa. St. 528).

The other authorities referred to fully sustain the principle announced by the foregoing quotations.

Attention is also called to the fact that, in all these cases, the view was of land, a view of which might be supposed to aid the jury in determining its value, or whether it would be benefited by the improvement. In the present case, so far as the proposed assessment against the railroad company was concerned, there was no question of the value of, or of damage or benefit to, land, but the sole questions for the jury in order to determine whether the extension would benefit the railroad company was how much the extension would cost, and to what extent, if at all, its revenues would be increased thereby. A view of the situation would afford no competent or sufficient basis for deciding these questions.

The only thing they could do in this direction was to take into consideration the surroundings of the proposed extension, and consider it in connection with the evidence before them. When the situation as presented is considered, instead of its militating against the facts as stated by the witness Lackey, it supports and enforces the conclusions to be drawn from his evidence. The extension in question is about nine-tenths of a mile long, through a sparsely settled suburb of the city. The residences west of the extension are very few, and on the east the territory along the line is by no means thickly settled, except in the little village of Mt. Pleasant, and that lies so that at least one-half of the population there is equally accommodated by the Fourteenth street line of cars. Beyond that village, east, north, and west, there is no considerable population to patronize the extension. No point on the extension is much nearer to the Zoological Park than was the terminus of the road at the time of the passage of the act, and the terminus prescribed by the act at Park street is not near enough to Rock Creek Park to induce travel to that point by the defendant road. It can not be denied, upon the evidence in the record, that it would require an increase of about nine hundred passengers daily to pay the increased expenses

caused by such extension, and it is perfectly apparent from the surroundings of the extension that a tenth of that number would not be secured.

In the case of Smyth *vs.* Ames, 169 U. S. 468, it was held by this court that the legislature, in the exercise of its undoubted power to prescribe maximum rates for the carriage of passengers and freights, could not so reduce them as to prevent the railroad companies from receiving a reasonable return upon their investments. It would seem that the same principle should apply here. Assuming that Congress had the power to require the appellant to extend its line, which, however, is not conceded, still the act in question bears upon its face the evidence that Congress did not intend that there should be any assessment against the defendant unless it should in fact be benefited by the extension of its line, and then only to the extent of such benefit.

We think that it may be safely said that the scope of the opinion in Smyth *vs.* Ames, and other like cases decided in this court, furnishes the rule that should have governed the jury and the court below in determining whether the appellant would be benefited by the extension of its line. That rule would be to consider the interest on the cost of the construction, the increased operating expenses, and the probable increase, if any, in the earning capacity to be derived from the extension. This rule was not followed, but ignored by the jury and the courts below. Taking into consideration the situation and the evidence in the record, it appears that the jury ignored it, and fixed an arbitrary sum as benefits to be assessed against appellant based entirely upon speculation and wholly without evidence. They assumed, without any attempt at proof, that in the distant future the appellant might possibly derive a profit from such extension. There is no other ground upon which the assessment could have been based.

That the trial court understood that the jury proceeded

upon this assumption in making its assessment against the railroad company is apparent from the remarks of the learned judge of that court in his opinion confirming the verdict of the jury, which was printed with the brief of the appellee in the court below. The following is quoted from that opinion:

> "It is true this mode of assessing may be an unusual one here with respect to street openings; but it could not be denied that Congress might require a railroad company, and as the price or consideration of a franchise extended to it, to pay a sum, either to be named in the law by Congress itself, or to be ascertained by a jury of inquisition, to be applied to the expense of the improvement" (see appellees' brief, page ——).
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> "This great road, with its numerous far-reaching franchises, has thus far been called upon to make no contribution to the public in the form of a price for the franchise given it. Congress authorized, as appears in the statute before us, the enlargement of the powers of the railroad company by giving it a new field of operation, which it is obvious must be beneficial to the railroad, enabling it, as it would do, to land passengers in much nearer proximity to the great Zoological Gardens and to the village of Mt. Pleasant, *and ultimately, by preoccupying the ground, to procure a still further field of operation to the utmost limits of Sixteenth street, when extended*" (see appellees' brief, page ——).
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> "It would be most short-sighted if the court should act upon this idea that there would be no considerable increase in the travel *in the future*, taking into consideration the proximity of the Rock Creek Park and the Zoo to the line of the new road, and the increase of travel from the extension of Sixteenth street to Park street, for the accommodation given to the residents in that vicinity who are now compelled to rely upon the Fourteenth street road" (see appellees' brief, p. ——).

These extracts, taken together, indicate that, in the opinion of the trial court, the basis of the assessment was not any advantage to accrue to the railroad company upon the construction of its extension as shown by any evidence in the case, but what it might be anticipated, speculatively, without proof, would accrue to it in the more or less distant future. There is also a suggestion, contrary to the fact, that the company has never paid anything for its franchise, and that, therefore, it would be proper to take this into consideration in determining whether it would be benefited by the proposed extension. If the railroad company had requested the passage of the act and Congress had passed it at its instance it might have imposed such terms as it saw fit, which the company could have accepted or not, but it is respectfully submitted that it would not be competent for Congress, as is shown under the fourth point in this brief, to take from it any of its property under the guise of an amendment to its charter as a consideration for the original grant of its charter; and that still less is it competent to hold that, under this statute imposing upon it liability only in the event that it shall be found to be benefited by the proposed extension and to the extent of that benefit, it may be assessed without any evidence of such benefit, or of its extent, on the ground assumed by the court, without evidence and contrary to the fact, that it had paid nothing for its franchise over its original routes.

Nor, in making special assessments, is it competent to consider speculative and possible future benefits that may accrue from increased business, nor is it proper to take into account possible profits that the improvement of the highway may bring to the owner of the land. The benefit intended is a present and appreciable, not a speculative and remote one.

Norwood *vs.* Baker, 172 U. S. 269.

R. R. Co. *vs.* Tyree, 7 West Va. 698.

Friedenwald *vs.* May & Co., of Baltimore, 74 Md. 126.

Old Colony & Fall River R. R. Co. *vs.* County of Plymouth, 14 Gray, 155.

Boston & Maine R. R. *vs.* County of Middlesex, 1 Allen, 331.

The Eckington and Soldiers' Home Railway Co. *vs.* McDevitt, 191 U. S. 103.

In the case of Norwood *vs.* Baker, this court said:

> "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment" (172 U. S. 279).

Again, in the opinion in that case it is said with approval that Judge Dillon, in his work on Municipal Corporations, has—

> "asserted what must upon principle be regarded as the just and reasonable doctrine, that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited; and, since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury" (172 U. S. 288).

In paragraph 247 of Elliott on Roads and Streets (2d ed.), it is said:

> "Remote or merely speculative benefits should not be taken into consideration in any case, but such only as are reasonably certain, and such as add to the value of the owner's estate or property, and not such as enure to him in common with the commu-

> nity at large. It is not competent, as a rule, at least, to take into account possible future benefits that may accrue from the increase of business, nor is it proper to take into account possible profits that the opening of the highway may bring to the owner of the land" (Elliott on Roads and Streets, par. 247).

In R. R. Co. *vs.* Tyree, 7 West Va. 698, the court said:

> "The commissioners should determine what would be a just compensation for the land taken, when taken. They were to decide questions of present value, and not to speculate in respect to the probable consequences of constructing and operating a railroad. These are too uncertain to be made the subject of judicial inquiry" (7 West Va. 698).

Although the question there was the value of land to be taken, and not the benefit to land or property not taken, it would seem that the same rule should equally apply in the latter case.

In the case of Friedenwald *vs.* Mayor, etc., of Baltimore, 74 Md. 126, the Court of Appeals of Maryland used this language:

> "In assessing benefits for opening or widening Baltimore street, the jury can not indulge in vague speculations or conjecture; but must only assess such benefits, if any, as it is, in their opinion, fairly and reasonably apparent that the property of the appellants will receive from the proposed improvement, other than the general benefit to the community" (74 Md. 126).

In the case of the Old Colony & Fall River R. R. Co. *vs.* County of Plymouth, 14 Gray, 155, it was held that the county could not set off against damages to the railroad company for its lands taken for a public road, benefits which might be presumed to accrue to it by increased travel induced by the opening of the county roads.

In the case of Boston & Maine Railroad *vs.* County of

Middlesex, 1 Allen, 331, the same ruling was made, and the court said:

> "The supposed or possible advantage to the petitioners by an anticipated increase of trade and business on their railroad in consequence of the sale, likely to result from the laying out of the highway, of many of the house lots into which the land of Emerson had been divided, was too remote, inconsiderable and contingent to be made the basis of any proper estimate of the damages which they sustained by the laying out of a highway, or of the compensation which ought to be awarded to them" (1 Allen, 331).

The foregoing authorities conclusively show that if any assessment against the railroad company in this case were proper it could only be based upon the probable increase of travel to be reasonably anticipated from the extension in the condition that the surrounding country was at the time of the assessment, and that there could not be taken into consideration any supposed increase of revenues to be derived from the future uncertain establishment of other residences and of other conditions in that locality and beyond it. From the evidence in the record and the surrounding circumstances it could not be assumed with any degree of certainty that the railroad company would receive in the immediate or near future any considerable increase of revenues, certainly not sufficient to keep down the increase in expenses. Any attempt at a determination of that question would be purely speculative.

SECOND.

The Proceeding as Conducted Was Not Due Process of Law.

Assuming that the statute provides for due process of law in the ascertainment of the question of whether benefits would accrue, and, if so, the amount thereof, it has not been

pursued. The statute contemplates that there should be an actual investigation into the facts by the court and jury for the purpose of ascertaining what the effect of the extension would be upon the parties interested. It has been shown that no investigation whatever to determine the question of benefits to the railroad company was entered upon by the jury. It is true they listened to the evidence introduced by the railroad company, but it is quite as evident that they wholly declined to consider it, or to seek any other or further proper information upon the subject. It was, perhaps, not an easy task to perform, but this can not legally justify the "taking" of $25,000 of the company's money wholly without evidence to support such an award.

That due process of law may be denied a party by the improper execution or enforcement of a constitutional statute, as well as by the terms of the law itself, is a familiar doctrine of this court.

In the case of the Chicago, Burlington, etc., R. R. Co. *vs.* Chicago, 166 U. S. 226, this court said:

> "But it must be observed that the prohibitions of the amendment referred to all the instrumentalities of the State, its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State violates the constitutional inhibition; and, as he acts in the name of and for the State, and is clothed with the State's power, his act is that of the State" (238 U. S., pp. 235-6).

> "In (the State's) judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form" (166 U. S. 236-7).

In the same opinion the court, quoting from Story on the Constitution, uses the following language:

> "Due process of law requires, first, the legislative act authorizing the appropriation, pointing out how it may be made, and how the compensation shall be assessed; and, second, that the parties or officers proceeding to make the appropriation shall keep within the authority conferred, and observe every regulation which the act makes for the protection or in the interest of the property owner, except as he may see fit voluntarily to waive them" (166 U. S. 241).

Due process of law under this statute, if it be valid, required an actual investigation by the jury into the facts necessary to enable them to determine whether the railroad company would be benefited. This was not done, but the jury declined to consider the evidence introduced by the appellant, or any other evidence, but assumed from circumstances coming under their observation from the view made by them, which was not evidence, that appellant would be benefited, and arbitrarily fixed the amount at $25,000. There were no facts or data of any kind before them from which any sum could have been fixed. If the act had required the company to extend its road and to pay $25,000 into the treasury of the District, without requiring any investigation into the question of benefits, it would have been clearly void, as attempting to deprive appellant of its property without due process of law, unless it should be held that Congress possesses the power arbitrarily to require such an extension and payment as the condition of the further exercise of its franchises. The attempt to require such a payment by the verdict of a jury, without such an investigation, under a statute which allows only the assessment of such benefits as the extension shall be found to confer upon the company, is as clearly void, since the jury certainly was without the slightest claim to any arbitrary power in the premises.

THIRD.

No Personal Liability Can be Imposed by a Special Assessment, But Only a Lien Upon Real Estate Benefited.

There is some conflict in the decided cases upon the question under what circumstances and in what manner special assessments may be made upon property supposed to be benefited by a certain local improvement, but there seems to be a unanimity of opinion to the effect that these assessments are not founded upon any idea of revenue, but upon the question of benefits conferred by such improvements upon property situated in the locality thereof. And the only grounds upon which the courts have proceeded in holding that such assessments are not in violation of the constitutional provisions providing for due process of law, and for compensation for property taken for public use, is that the property by the local improvement is increased in value to the extent of the benefits assessed. However unreal this may prove to be in particular cases, the assessment can be sustained upon no other theory. This has been announced in several decisions of this court, and in none more forcibly than in the case of Norwood *vs.* Baber, *supra*, and it is not understood that this principle there announced has ever been departed from by this court in any case.

If this principle be correct, then a special assessment must, in the very nature of things, be made against the property benefited, or some interest therein, and this statute directing such an assessment against appellant is void.

Cooley on Taxation, p. 1288, and notes.
Craw *vs.* Tolono, 96 Ill. 255.
Barber Asphalt Paving Co. *vs.* Watt, 51 La. Ann. 1354.
Meyer *vs.* Covington, 103 Ken. 548.
Taylor *vs.* Palmer, 31 Cal. 240.
Hoover *vs.* The People, 171 Ill. 184.
Green *vs.* Ward, 82 Va. 324.
Asberry *vs.* Roanoke, 91 Va. 562.

While Judge Cooley, in his work on Taxation, speaking upon the subject of special assessments, says that they have been made personal charges in a great number of instances, he also intimates that this may be accounted for upon the ground that they have not always been contested, and gives it as his opinion that the logic of the rule is against the creation of a personal liability by a special assessment. Upon this point he says:

> "In the case of the ordinary taxes no sufficient reason exists why those on lands should not be made a personal charge against the owner, if he is a resident and has the usual opportunity to be heard. The taxes are not so much assessed in respect to the particular lands as the value of the particular lands is taken as a measure of the owner's duty to the State. He is not taxed in consideration of State protection to that particular item of property, but he is taxed for the general protection which the State affords to his life, his liberty, his family and social relations, his property, and the various privileges the law grants to him. If a tax measured by the property should, in its enforcement, take from him more than that property is worth, it would not follow that the State had taken beyond the equivalent rendered. Indeed, the contrary would be almost certainly the fact. It is different in the case of an assessment made upon the basis of benefits. Such an assessment regards nothing but the benefit that is to be conferred upon the particular estate. The levy is made on the supposition that that estate, having received the benefit of a puulic improvement, ought to relieve the public from the expense of making it. In such a case, if the owner can have his land taken from him for a supposed benefit to the land, which, if the land is sold for the tax, is thus conclusively shown he has not received, and he then be held liable for a deficiency in the assessment, the injustice—not to say the tyranny—is manifest. But such a case is liable to occur if assessments are made a personal charge; and cases like it in principle, though less

extreme in the injury they inflict, are certain to occur.

"The cases are not uncommon in which, on a sale of lands for the payment of a special assessment for a drain or a levee, the whole estate assessed is sold and lost to the owner. Such instances may occur in the case of other improvements. If the statute allows a sale to the highest bidder, the land may be lost to the owner, leaving a balance of the assessment still uncollected. The loss of his lands is incident to a proper exercise of the power of the Government, and, though severe, can give him no ground for complaint. The assessors have perhaps erred in their judgment; but this may occur in any tax proceeding. The estate was lawfully charged with the supposed benefit, and the charge has been enforced. But where and what are the benefits to the individual for which he can be called upon to pay any deficiency after a sale of the estate? Unless the whole legal basis of these assessments has been misunderstood by the courts, it would seem that there are none whatever."

In note 1, on page 1288, from which this quotation is taken, there are cited well considered cases from the States of California, Illinois, Indiana, Kentucky, Iowa, Mississippi, Missouri, New York, Oregon, Pennsylvania, Virginia, and Washington, many of the most important of them having been decided since the text was first written by the distinguished jurist, and many of the opinions follow the text and adopt its reasoning. While it is true that he said at the time he wrote that the weight of authority was in favor of the personal liability rule, considering the number of well considered cases that have since been decided, it may well be stated that the weight now preponderates against the rule. The cases on both sides are referred to in the notes and it will be noticed that those supporting the rule of personal liability are the earlier cases, and in many of them the question does not seem to have been argued. The cases cited in this brief supporting the rule that no personal lia-

bility can be thus created are taken largely from this note, and, as will be seen, are from courts of highest authority. The case of Asberry *vs.* Roanoke, supra, decided by the Court of Appeals of Virginia, is also reported in the 42 L. R. A. 636, and there is a note by the reporter to the effect that the case of Norwood *vs.* Baker is considered as settling the rule against personal liability in this court.

In the case of Dewey *vs.* Des Moines, 173 U. S. 193, this question was argued, but the court declined to decide it, as it was not made a Federal question in that case, but held the personal judgment against the lot owner void on the ground that he was a non-resident of the State of Iowa (although he was personally before the court), and the statute could not impose a personal liability upon him, however it might be as to a resident of the State.

In the case of Davidson *vs.* New Orleans, 96 U. S. 97, there was a personal judgment entered by the Louisiana court against the owner of the property for the amount of the tax, as well as declaring it a lien upon the property, and it was contended that the personal judgment was erroneous. This court said upon that point:

> "And lastly, and most strongly, it is urged that the court rendered a personal judgment against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force—and some highly respectable authorities are cited to support the proposition—that while for such improvements as this a part, or even the whole, of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it" (96 U. S. 106).

But the court declined to decide the point, as it did not involve a Federal question.

In Craw *vs.* Tolono, 96 Ill. 255, the court held the section of a charter of a municipal corporation authorizing a personal judgment against the owner of land for the amount

of a special assessment upon it unconstitutional. In several subsequent cases in that court, referred to in the above mentioned note in Cooley, that case is referred to with approval. In the case of Hoover *vs.* The People, 171 Ill. 184, where a joint judgment against two lots of the same owner was given by the court below for the aggregate of the amounts of special assessments upon them, the Supreme Court of Illinois said:

> "Such a judgment is wholly unauthorized. Judgment for special taxes are *in rem*, and can only lawfully operate against the particular tract or lot of land against which the taxes were assessed,"

and referred to the case of Craw *vs.* Tolono.

In Barber Asphalt Pav. Co. *vs.* Watt, 51 La. Ann. 1354, the court said:

> "Another and more serious contention of the defense is that in no event does any personal liability attach to property holders on account of this local assessment; that whatever liability there may be in this regard it must be confined to the property affected with the lien granted by the statute, and that after exhausting recourse against the property, individual property holders can not be further pursued for any balance remaining over, and other property of theirs, not on the street paved, subjected to its payment.
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> "We hold this to be so, and that the proceeding is one purely *in rem*, acting on the property supposed to be benefited, and none other."

In Meyer *vs.* Covington, 103 Ken. 548, the court said:

> "The appellee instituted this action in the Kenton Circuit Court against the appellant to enforce the collection of more than $700, the amount alleged to be due from him for certain street improvements, and claimed a lien on his property fronting or abutting upon York street, in the city of Covington, due upon the assessment for expenses incident to the widening of York street in said city."
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> . . . . . .

> "It, however, seems to us that if it be conceded that the city charter was intended to authorize a personal judgment against the appellant for the amount assessed against his abutting property that such provision is unconstitutional and void. It was, therefore, error to render a personal judgment against appellant for any amount."

And this was followed with approval by the same court in the case of Barker *vs.* Southern Con. Co., 47 S. W. Rep. 608.

In Taylor *vs.* Palmer, 31 Cal. 240, a personal judgment was directed to be entered against the owner of the property for the amount of any difference between the amount that might be raised by a sale of the benefited property and the amount of the special assessment. In holding this judgment illegal, the court said:

> "This form of judgment is expressly authorized by the statute (secs. 13 and 17), but we are of opinion that the statute is unconstitutional so far as it affords relief beyond the fund to be realized by a sale of the property assessed."
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> "To avoid any misconception of our meaning, we add that the power of taxation, when exercised either by the legislature immediately or mediately through the intervention of a municipal corporation, must be exercised under and within the limitations of the Constitution—that is to say, it must be exercised upon the *ad valorem* principle, and so as to secure equality and uniformity, except when exercised through a municipal corporation for the purpose of improving its streets. When so exercised, it is withdrawn or excepted from the constitutional limitations so far, and no farther, as to permit its exercise for the purpose and in the mode indicated and measured by the word 'assessment,' as defined and understood in the legislative and judicial history of the country at the time the Constitution was adopted. At that time a personal liability, to be satisfied by the seizure

> of other property than that assessed, property not bordering upon nor in the vicinity of the improved street, and therefore not benefited by the improvement, constituted, so far as we are advised, no part of the mode. The mode then in vogue was made by a definition a part of the Constitution, and became and remains the measure of the power of 'assessment' which may be restricted by the legislature with a view to prevent abuse, but can not be enlarged without overturning the limitations of the Constitution."

Many other cases cited in the note above referred to are to the same point.

The logical result of the principle upon which special assessments are sustained would seem to require that they must be *in rem*. The subject of the assessment must have a permanent location in order to be benefited by a local improvement, and therefore must be land or some interest in it. It is not contended, nor can it be, that any specific parcel of the appellant's real estate, or interest therein, can or will be benefited.

If a valid award against the company, as held by the court below in the rejection of the instructions prayed on its behalf, it becomes not only its personal obligation, but the personal liability of its stockholders as well, its charter rendering them individually liable for all its debts and liabilities to an amount equal to the stock held by them (act of July 1, 1864, sec. 19).

It is plain from the act that Congress did not contemplate any such assessment against appellant as has been made.

FOURTH POINT.

Congress Had No Power Without the Assent of the Appellant to Require It to Extend Its Road.

This power is claimed under the right reserved in the charter to alter, amend, or repeal. But it is well settled

by the decisions of this and other courts that such power is not unlimited, and that the legislature can not, by virtue of it, take from the corporation any of its property, or, which would be the same thing, require it to make expenditures for the public good beyond the duties required of it in the original charter.

Shields *vs.* Ohio, 95 U. S. 319.
Miller *vs.* The State, 15 Wallace, 498.
Sinking Fund cases, 99 U. S. 700.
County of Santa Clara *vs.* Southern Pacific R. R. Co., 18 Fed. Rep. 385.
Lake Shore, etc., R. R. Co. *vs.* Smith, 173 U. S. 690.
St. Louis Iron Mountain, etc., *vs.* Paul, 173 U. S. 404.
Commonwealth *vs.* Essex County, 13 Gray, 239.
Commissioners, etc., *vs.* Holyoke Water Power Co., 104 Mass. 446.
Detroit *vs.* Detroit and Howell Plank Road Co., 43 Mich. 140.
Zabriskie *vs.* H. & N. Y. R. R. Co., 18 N. J. Eq. (3d C. E. Green), 178.
Miller *vs.* N. Y. & Erie R. R. Co., 31 Barb. 513.

In Shields *vs.* Ohio, this court said:

> "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong can not be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases."

And again, in the Sinking Fund cases, it was said by this court:

> "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit no one can doubt. All agree that it can not be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made."

In the case of the County of Santa Clara *vs.* The Southern Pacific R. R. Co., 18 Fed. Rep. 385, in the course of a lengthy opinion by Mr. Justice Field, it is said:

> "The State may, of course, accompany its grant with such conditions as it may deem proper for the management of the affairs of the corporation which do not impinge upon any provision of the Federal Constitution; and by the reservation clause it will retain control over the grant, and may withdraw it or modify it at pleasure. It is on this ground that the State has asserted a right to regulate the charges —the fares and freights—of corporations. But it is a novel doctrine that it can on that ground also control their property, appropriate it, burden it, and despoil them of it, as it may choose, unrestrained by any constitutional inhibitions. That doctrine has no standing as yet in the law of this country. The property acquired by corporations is held independently of any reserved power in their charters. By force of the reservation the State may alter, amend, or revoke what it grants; nothing more. It does not grant the tangible and visible property of the companies, their roads, their roadways, roadbeds, rails, or rolling stock. These are their creation or acquisition. Over them it can exercise only such power as may be exercised through its control of the franchises of the companies, and such as may be exercised over the property of natural persons engaged in similar business."

In the case of Com. *vs.* Essex Co., 13 Gray, 239, a statute authorizing said company to construct a dam across the Merrimac River and requiring it to construct and maintain efficient ways for the passage of fish, and subsequently, when said fishways proved insufficient, requiring the company to pay damages to those injured in their fisheries, which said company did, and afterwards a third act was passed requiring said company to construct efficient fishways, and it appeared that the cost thereof would be from $10,000 to $40,000, it was held that the last-mentioned act was invalid, not being authorized by the power to alter, amend, or repeal. In delivering the opinion of the court, Shaw, C. J., limits this power in the following language:

> "that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted."

In the case of Commissioners, etc., *vs.* Holyoke Water Power Co., 104 Mass. 446, Gray, J., in speaking of this power generally as to railroads, said:

> "Railroad corporations may be compelled, by general or special laws, to make changes in the level, grade, and surface of the roadbed, new structures at crossings of other railroads or of highways, or station-houses at particular places, in a manner, and to be enforced by forms of process, different from those provided for or contemplated by the original charter, or the general laws in force when that charter was granted,"

and refers in support thereof to the Massachusetts cases referred to in the opinion of the court below, except the one in 109 Massachusetts, which had not then been decided.

In the case of Detroit *vs.* Detroit and Howell Plank Road Co., 43 Mich. 140, it was held that, the company having constructed a road between two points in accordance with

its charter, the legislature under the power in question could not require it to abandon a portion of the road. Judge Cooley delivered the opinion of the court, and in commenting upon the cases cited by Chief Justice Alvey, in the opinion of the court below in this case to sustain the power in such cases, said:

> "There are cases in which amendments to charters having some resemblance to this have been sustained, but it is in general easy to distinguish them. Many of these are cited in the brief for the relator. Commissioners *vs.* Holyoke Co., 104 Mass. 446, in which a company having a dam across the Connecticut River was required to construct a fish-way, was a case involving a mere police regulation for the preservation of rights of others in the fishery above and below. All the following cases involved the same principle: Commonwealth *vs.* Eastern R. R. Co., 103 Mass. 254, where a railroad company was required to build a station-house and stop its trains at a certain locality; Albany, etc., R. R. Co. *vs.* Brownell, 24 N. Y. 345, in which it was held competent to require a railroad company to permit and provide for the crossing of its track by highways; Roxbury *vs.* Boston R. R. Co., 6 Cush. 424, in which a like question was involved; English *vs.* New Haven, etc., Co., 32 Conn. 240, in which a bridge, made necessary for the convenience of a railroad company, and used by the company and the public, was required to be made wider by the company; Worcester *vs.* Norwich, etc., R. R. Co., 109 Mass. 103, in which the railroads coming into a city were required to unite in a common passenger station at a point to be determined by commissioners; Meadow Dam Co. *vs.* Gray, 30 Me. 547, in which a company incorporated to build a dam across a river was required to construct a lock for purposes of navigation; and there are many others of the same sort."
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> "But there is no well considered case in which it has been held that a legislature, under its power to amend a charter, might take from a corporation any

> of its substantial property or property rights. In some cases the power has been denied where the interest involved seemed insignificant. The case of Albany, etc., R. R. Co. *vs.* Brownell, 24 N. Y. 345, is an illustration. It was there decided that although the legislature might require railroad companies to suffer highways to cross their tracks, they could not subject the lands which the companies had acquired for other purposes to the same burden, except in connection with provision for compensation."

Judge Cooley then refers to the case of Commissioners *vs.* Essex Co., *supra*, and some other cases as sustaining the same principle, and added:

> "What the State claims a right to do is to deprive the respondent of the privilege any longer to take tolls for travel and traffic on two miles and a half of its road. If it may do this in respect to one part of the road, it may in respect to any other part. If it may exclude the respondent from Detroit, it may from Howell also, or from any township on the line, and a single section of a statute may annihilate the property of respondent altogether. A statute which could have this effect would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation, but spoliation.
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> "It may be that what the legislature of 1873 proposed to accomplish would in itself work no hardship to respondent, and would be highly desirable to the city; but the principle violated is the fundamental principle that underlies all property; and the first successful inroad upon it that obtains judicial sanction may be a precedent that shall be to innumerable evils. Courts must look beyond the particular case to the governing principle, and be governed by that, regardless of temporary and special inconveniences."

In Zabriskie *vs.* The H. & N. Y. R. R. Co., 18 N. J. Eq. Rep. (3 C. E. Green), 178, the question arose upon a bill for an injunction by a stockholder against the undertaking by

the corporation of the extension of its road authorized by the legislature under the power to alter or amend, contained in the original charter. The court said:

> "Again, the power to alter or modify the act, and the true construction of this it held to be an alteration of something contained in or granted by the act. Any of the franchises granted may be altered; the right to take land by condemnation, the right to take tolls or fare, or the amount to be taken. But the legislature had no right to impose upon the company any other duty or . . . thing involving any other duty, than that stated . . . the building a railroad from the Potomac river to Hackensack; anything in the manner of doing that they had the right to change. They could not oblige it to then and there all the meadows along the Hackensack, or to construct a canal, or to build a road from Hoboken to Newark, nor could they oblige it to extend its road to Boonton. They could do and oblige it to do no to the Franklin" (39 N. J. Eq., pp. 585-6).

In the case of Miller et New York & Erie R. R. Co., 21 Barb.(513) it was attempted under the power to alter or amend to require the company to bear the expense of laying out a street over the right of way and the necessary embankments, etc. The court said:

> "It is not material to inquire whether the legislature has a right to repeal the defendant's charter, unless it has been forfeited by the misconduct or neglect of its managers. It has not been repealed, and, until it shall be, the company is and will be protected by the Constitution in its rights of property" (21 Barb. 513).

In the case of the Lake Shore, etc., R. R. Co. v. Ohio, 173 U. S. 285, this court had under consideration the constitutionality of a statute of Michigan requiring railroad companies to keep an ash embankment and fence at certain rate good for two years. The court recognized in that

case the power of the legislature to make a reasonable regulation of rates, but held that the law in question was in excess of that, or any other constitutional power lodged in the legislature. Amongst the arguments of counsel in that case in favor of the power was that the legislature had the power of amendment, alteration, and repeal. Speaking upon this subject, at page 690, it is said by this court:

> "Assuming that the State is not controlled by contract between itself and the railroad company, the question is how far does the authority of the legislature extend in a case where it has the power of regulation, and also the right to amend, alter, or repeal the charter of a company, together with a general power to legislate upon the subject of rates and charges of all carriers. It has no right even under such circumstances to take away or destroy the property or to annul the contracts of a railroad company with third persons (Greenwood *vs.* Freight Company, 105 U. S. 13, 17; Commonwealth *vs.* Essex County, 13 Gray, 238; People *vs.* O'Brien, 111 N. Y. 1, 52; Detroit *vs.* Detroit & Howland Plank-road, 43 Mich. 140).
>
> "A railroad company, although a quasi public corporation, and although it operates a public highway (Cherokee Nation *vs.* Southern Kansas Railway, 135 U. S. 641; Lake Shore, etc., Railway *vs.* Ohio, 173 U. S. 285, 301), has nevertheless rights which the legislature can not take away without a violation of the Federal Constitution, as stated in Smyth *vs.* Ames, 169 U. S. 466, 544. A corporation is a person within the protection of the Fourteenth Amendment (Minneapolis & St. Louis Railway *vs.* Beckwith, 129 U. S. 26; Smyth *vs.* Ames, 169 U. S. 466, 522, 526). Although it is under governmental control, that control must be exercised with due regard to constitutional guarantees for the protection of its property."

Also on pages 697 and 698 it is said:

> "It is no answer to the objection to this legislation to say that the company has voluntarily sold thou-

sand-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business, which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company.

"To say that the legislature has power to absolutely repeal the charter of the company and thus to terminate its legal existence does not answer the objection that this particular exercise of legislative power is neither necessary nor appropriate to carry into execution any valid power of the State over the conduct of the business of its creature. To terminate the charter and thus end the legal life of the company does not take away its property, but, on the contrary, leaves it all to the shareholders of the company after the payment of its debts."

And again, on page 698, it is said:

"The power to enact legislation of this character can not be founded upon the mere fact that the thing affected is a corporation, even when the legislature has power to alter, amend, or repeal the charter thereof. The power to alter or amend does not extend to the taking of the property of the corporation either by confiscation or indirectly by other means." . . .

It will be seen by reference to the foregoing authorities that the cases relied upon by the appellees and referred to by the Chief Justice of the Court of Appeals as sustaining the opinion of the court below upon this point are con-

sidered by Judge Cooley in his opinion in the case of Detroit *vs.* Detroit and Howell Plank Road Company, as proceeding upon a different principle, and referable rather to the exercise of the police power by the legislature than the reserved power of alteration and amendment; and the opinion of this court in the case of Lake Shore, etc., Railroad Co. *vs.* Smith, *supra*, refers to the Michigan case with approval, as well as other cases which make the same distinction. In the Michigan case it was held that the legislature, under this reserved power, could not require the corporation to shorten its road, because by so doing it decreased its revenue and thereby destroyed or took its property without compensation. If the legislature may not require the corporation to abandon the operation of a portion of its road, upon what principle can it require it to extend it, especially where it is apparent that the extension will involve heavy expense to the company without any certain adequate increase in its revenues therefrom.

In this connection attention is directed to the expression in Judge Cooley's opinion:

> "It may be that what the legislature of 1879 proposed to accomplish would in itself work no hardship to respondent and would be highly desirable to the city, but the principle violated is the fundamental principle that underlies all property;"

and to his further declaration that—

> "courts must look beyond the particular case to the governing principle and be governed by that, regardless of temporary and special inconveniences."

It would seem that the principle here declared is in harmony with the theory of all government that corporations, as well as persons, are to be judges of when and whether their capital shall be embarked in enterprises in which they

are not already engaged, and the question, under such circumstances, of whether the new undertaking would be an advantage or disadvantage to the corporation is not one which the legislature has the right to consider, or with which it has the power to deal.

It is submitted that it is apparent from the circumstances of this case, and from the length and nature of the extension to be made, that the appellant would certainly lose in the present and in the near and indefinite future by the undertaking. But, if the contrary were the fact, and the precedent be now established that Congress may require it to extend its road, it may at any time in the future be required to extend it to the District line, which might be absolutely destructive of its property.

The fact that on two prior occasions Congress has authorized and required this road to extend its line is referred to in the opinion of the court below. But that can not affect this case. It does not appear but that the appellant requested and desired those extensions. If it did not, and preferred to construct the extensions rather than to then raise the question of the power of Congress to require it, its having done so could not in any way affect any of its rights. Nor can the fact that it has, since this assessment was made, extended its road in accordance with the act of Congress, affect the question. It may well have preferred such course rather than to have become involved in any conflict with Congress which might have arisen over its refusal to do so. If the part of the act requiring it to extend its road is invalid, it follows that the part authorizing the assessment is equally so, and the extending of the road could in no way validate the assessment. In this connection the declaration of this court upon the point and to the above effect, hereinbefore quoted from the opinion in the case of the Lake Shore, etc., vs. Smith, is referred to, as well as the declaration therein contained that the power of the

legislature absolutely to repeal the charter can not and does not broaden or affect its powers under the reservation to alter and amend.

It is respectfully submitted that no questions arise in this case as to the power of Congress upon the subject of general taxation of corporations, or its right of regulation, referable to the exercise of the police power, and that the act in question is in excess of the power of Congress under the reservation of the right to alter and amend the charter, and is, therefore, invalid and constitutes no authority for the assessment against it.

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Attorneys for Appellant.

FILED
OCT 21 1904
JAMES H. MCKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

October Term, 1904.

No. 16.

METROPOLITAN RAILROAD COMPANY, Appellant
and Plaintiff in Error,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, and JOHN BIDDLE, Commissioners of the District of Columbia,

Appellees and Defendants in Error.

BRIEF AND ARGUMENT FOR APPELLANT AND PLAINTIFF IN ERROR.

Appeal from the Supreme Court of the District of Columbia.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 16.

METROPOLITAN RAILROAD COMPANY, APPELLANT AND PLAINTIFF IN ERROR,

vs.

HENRY B. F. MACFARLAND, HENRY L. WEST, AND JOHN BIDDLE, COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

Brief and Argument for Appellees and Defendants in Error.

STATEMENT OF THE CASE.

The Metropolitan Railroad Company was incorporated by an act of Congress of July 1, 1864 (13 Stats., 326).

Section 2 of this act provided—

"*That said road shall be deemed real estate.*"

Section 5 thereof enacted:

"That nothing in this act shall prevent the Government at any time, at their option, from altering the grade or other-

wise improving all avenues and streets occupied by said roads, or the city of Washington from so altering or improving such streets and avenues, and the sewerage thereof, as may be under their respective authority and control; and in such event it shall be the duty of said company to change their said railroad so as to conform to such grade and pavement."

"SEC. 6. *And be it further enacted*, That this act *may* at any time *be altered, amended*, or *repealed* by the Congress of the United States."

Section 17 provided that unless the corporation should make and complete one portion of their route within four months and other portions of their route within one year after the company shall have been organized the act should be null and void (13 Stats. at Large, 326).

This charter was altered and amended by act of March 3, 1865 (13 Stats., 536).

The latter act changed the route of the railway in some respects. It extended the line from D and Four-and-a-half streets, along Four-and-a-half street, to the Arsenal grounds, and made other changes not necessary to be noted, and extended the time for the completion of the road (13 Stats. at Large, 536).

By act of July 13, 1868, the Connecticut Avenue and Park Railway Company was incorporated, with authority to construct and operate along the west side of Seventeenth street to its intersection with Connecticut avenue; thence along said avenue to Boundary street (now Florida avenue), and also from the intersection of Boundary street and Connecticut avenue, along the county road from such intersection; thence on any road opened or which may hereafter be opened west of Fourteenth Street road, etc.

Section 2 of this act also provided "*that said road shall be deemed real estate;*" and it contains substantially the same provision as in the act above noted in respect of the alteration of grade and improving streets.

Section 6 of this act also provided that it "may at any time be altered, amended, or repealed by the Congress of the United States."

Section 18 of the act provided that that portion of the road beyond Boundary street should be completed within four years to its proposed terminus in the county of Washington (15 Stats. at Large, 85).

We understand that the Connecticut Avenue and Park Railway Company embraced a part of the route occupied by the plaintiff in error and was absorbed by it.

There was also another company, known as the Boundary and Silver Spring Railway Company, incorporated January 19, 1872, by the Legislative Assembly of the District of Columbia, which has been also apparently absorbed by the plaintiff in error, and by sections 3 and 4 of that act it was provided:

"SEC. 3 *And be it further enacted*, That nothing in this act shall prevent the proper authorities from altering the grade or otherwise improving said highway, and in such event it shall be the duty of said company to change their said railway so as to conform to such grade; and if at any time such grade shall be changed for the benefit of said railway company any expenses that may be incurred by property-holders affected by such change of grade shall be borne by the said railway company.

"SEC. 4. *And be it further enacted*, That this act may at any time be altered, amended, or repealed by the Legislative Assembly of the District of Columbia, or by the Congress of the United States."

By section 12 of the act approved May 18, 1872, Congress provided "that the Washington and Georgetown Railway Company and the *Metropolitan Railroad Company* be, and they are hereby required to remove their tracks, respectively, from the Capitol grounds, as hereby established, and to run the same as they may be directed, from time to time, by the officers in charge of the public buildings and grounds, as the grading and filling up of said grounds may render necessary" (17 Stats. at Large, 84).

By act of March 3, 1875, Congress provided "that the Washington and Georgetown and the Metropolitan Railway Companies, are directed to take up such portions of their tracks as may come in the way of the improvements of the Capitol grounds, and relay the same as may be directed by the officers in charge of improvements of the Capitol grounds" (18 Stats. at Large, 385).

By section 3 of the act of August 6, 1900, it was provided that if any "company operating a line or lines of street railroad from Georgetown or West Washington to or beyond the Capitol grounds shall fail to substitute for horse-power the power herein provided for (electricity) on all its lines within two years from the date of this act, such company shall forfeit its corporate franchises" (26 Stats. at Large, 310–311).

By act of July 28, 1892 (27 Stats., 290), Congress *required* the Metropolitan Railroad Company to repair the bridge across Rock creek at P street at a cost not exceeding $15,000.

Again, Congress by act of August 2, 1894, section 2 (28 Stats., 217), *required* the Metropolitan Railroad Company to equip and operate the lines of its cars with an underground electric system for the propulsion of such cars, "provided

there shall be completed an *extension* thereof," named in the act. And Congress also declared that "in default of such completions all acts or parts of acts chartering or extending the said road are hereby repealed."

By section 4 of the same act, Congress gave jurisdiction to the Court of Appeals of the District of Columbia to hear and determine the merits of the controversy which had resulted unfavorably to the District of Columbia on a plea of the statute of limitations interposed by the Metropolitan Railroad Company (132 U. S., 1), and "Provided, that unless said company shall file in said Court of Appeals its consent in writing to the aforesaid transfer of the said case, and also a waiver of all its rights and defenses under the statute of limitation and for want of notice as herein provided for, and also a waiver of all rights, benefits, advantages and defenses that it has or may have by reason of the decision and judgment of the Supreme Court of the United States made and entered in said case within thirty days after the approval of this act, then all rights granted to said company by this act shall cease and be determined: *Provided*, That the judgment of the said Court of Appeals shall be final and that there shall be no appeal therefrom: *And provided further*, That the cost of said transfer and of the hearing of said case in the Court of Appeals shall be paid by said railroad company."

By section 3 of the act of February 26, 1895 (28 Stats., 682), the Metropolitan Railroad Company was *required to lay down and continue* its underground electric construction of single track from the intersection of P and Thirty-fifth streets, northwest, thence running west along P street to Thirty-sixth street, etc."

This legislation shows that the previous construction of the charter of this railroad company by Congress and the company was that Congress possessed power over this company in the fullest measure. This company before June 6, 1900, was twice *required* to substitute electricity for horse-power in the operation of its cars; it was *required* to repair the P Street bridge at its cost; it was *required* in 1872 to remove its tracks from the Capitol grounds and to run the same as directed from time to time; it was *required* to make extensions of its lines in 1894, in 1895, and again in 1897 by act approved February 27, 1897 (29 Stats., 600); to make an *extension* to the terminus of its line along Columbia road to a point on the west line of Eighteenth street extended. It was from the latter point that the railroad company was required to extend its route by the act of June 6, 1900 (31 Statutes at Large, 668), now under consideration.

The history of the legislation respecting this company previous to June 6, 1900, can be found in the case of District of Columbia *vs.* The Metropolitan Railroad Company, 8 App. Cases D. C., 322, and laws relating to street railway franchises in the District of Columbia (1896), pp. 122 to 145, inclusive.

It is submitted that the course of legislation as shown by the acts of Congress above recited indicates a legislative interpretation acquiesced in by the railroad companies of the power and right of Congress to alter and extend the route of the appellant, under powers reserved in its charter and the amendments thereto. Such was the condition of legislation when, by the act of June 6, 1900, Congress required the appellant to further extend its lines. This act is entitled "An act authorizing and requiring the Metropolitan Rail-

road Company to extend itslines on old Sixteenth street" (31 Stats. at Large, 668). The provisions of this act are set out in appendix to this brief, which contains the opinion of Mr. Justice Hagner.

The first section of the act is addressed to the subject-matter of this extension, and requires the appellant "to extend by double tracks the lines of its underground electric railroad from its present terminus at Eighteenth street and Columbia road, eastwardly along Columbia road to the present Sixteenth northwest, thence north along Sixteenth street to Park street."

In order to provide this route in part at least, Columbia road is widened to a width of one hundred feet and Sixteenth street to a width of eighty-five feet from Columbia road to Park street. In order to acquire the land necessary to make this addition to the road and streets mentioned provision is made for the condemnation of the adjoining and abutting property, and section 2, after providing that a proceeding *in rem* shall be instituted to condemn the land, further provides "that the said Commissioners are authorized and empowered to locate the lines of the railroad of said company within the area so to be acquired as aforesaid."

Section 3 is addressed to the time when the railroad company shall *complete and put in operation* the extension of its lines, and that time is fixed as "within one year from the date of the widening of the said highways as herein provided, and (it is further provided) the said company shall deposit with the collector of taxes of the District of Columbia such sums as are necessary to pay the cost of the inspection of said work."

Section 4 provides "that of the amount found to be due

and awarded as damages for and in respect of the land condemned for the extension of Columbia road and the present Sixteenth street, as herein provided, such proportional amounts thereof as a jury hereinafter provided shall determine shall be assessed by said jury as benefits, and to the extent of such benefits against respectively the Metropolitan Street Railroad Company, and collected as special assessments are collected, and against those pieces or parcels of land on each side of said Columbia road and the present Sixteenth street northwest, along those portions of said street that are to be widened, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia road and the present Sixteenth street northwest, as said jury may find said pieces or parcels of land will be benefited."

It is supposed that this section in effect provides for the personal assessment against the railroad company, but it will be noted that the previous acts of Congress expressly state that the company's property shall be deemed real estate, and therefore we submit that the extended line acquired by the company by virtue of these charters became its real estate, and that the assessments could be collected as special assessments against this new line of the company; or, if the company failed to make the extension as required, Congress might, by subsequent legislation, forfeit the charter of the company if it deemed such course to be necessary. Proceedings were accordingly instituted on the 12th of July, 1900, for judicial condemnation of the land to be acquired and for the ascertainment respecting what benefits should be assessed against the several properties of the parties interested. We do not understand that any exception is taken to the

method of procedure, or that there is any claim but that every party interested was given an opportunity to be heard and had actual notice of the proceedings. The answer of the railroad company (Record, p. —) asserts that the appellant "is not the owner of any real estate or other property whatsoever, either abutting upon or adjacent to either Columbia road or Sixteenth street along the portions of said road and street which are proposed to be widened." * * * "This respondent is advised and believes, and therefore avers that the said act of Congress of June 6, 1900, is unconstitutional, illegal, and void, in so far as it seeks to compel this respondent to extend its lines over the territory in question, and then to condemn land for public uses along the said extension, which this respondent is thus required to make, and to compel it to pay therefor under the guise or on the ground of speculative benefits to it from the said compulsory extension of its lines, and in the absence of any property owned by it which could be benefited by the said contemplated condemnation proceedings."

It is admitted in its answer that "the former management" * * * "requested permission, at a previous session of Congress, to extend its lines over said Columbia road and Sixteenth street."

There is no provision in the act of June 6, 1900, which required the court to grant any instructions to the jury, but power was reserved to the court "to hear and determine any objections which may be filed to the verdict or award, and to set aside and vacate the same, in whole or in part, when satisfied that it is unjust or unreasonable" (sec. 8) (Record, bottom of page 29).

The plaintiff in error, however, by its counsel, filed ob-

jections to the assessment against it (Record, page 10) which embodied the instructions prayed of the court to jury on its behalf and rejected by the court.

There were five instructions thus asked:

1*a*. The jury is instructed that no benefits can be assessed by it against the Metropolitan Railroad Company as such, but that it can assess benefits only against such property of said company, if any, as it shall find will be benefited by the proposed widening and extension of Sixteenth street and Columbia road, and to the extent, if any, to which it shall find such property will be benefited by such widening and extension, just as in the case of the property of the other owners which it may find will be so benefited.

Refused, and exception by Darlington.

1*b*. The jury is instructed that under the evidence in this case it can make no assessment of benefits against the Metropolitan Railroad Company.

Refused, and exception by Darlington.

2. The jury is instructed that it can assess such benefits only against the Metropolitan Railroad Company, if any, as it has been shown by the evidence in the case will result to said company from the extension of Columbia road and present Sixteenth street, as provided in the act of Congress approved June 6, 1900.

Granted, and exception by D. C. and also by G. F. Williams on behalf of certain property-owners.

3. The jury is instructed that it is not required to assess any part of the amount which it shall award as damages

and in respect of the land condemned in these proceedings against the Metropolitan Railroad Company, and that it is its duty not to do so unless it is satisfied by a fair preponderance of the evidence that the said company will be specially benefited by the proposed extension of Columbia road and the present Sixteenth street, and, in case it shall be so satisfied, it is its duty to assess against the said railroad company only such sum as shall be a fair and reasonable measure of such benefits.

Granted, and exception by D. C. and also by G. F. Williams on behalf of certain property-owners.

4. In determining the question whether or not said railroad company will be benefited by the said extension and the extent of such benefit, if any, the jury shall consider the cost to which said company well be put in extending its lines from its present terminus, as provided in the act of June 6, 1900, and the increased cost of operating its said lines, as shown by the testimony, in connection with such evidence in the case as may tend to establish the fact and amount of such benefits to it.

Granted, and exception by D. C. and also G. F. Williams on behalf of certain property-owners.

Instruction 1*a*, which was refused, conceded the right to assess benefits against "such property of the company, if any, as it shall find shall be benefited by the proposed widening and extension of Sixteenth street, and Columbia road," but that instruction and instruction 1*b* also asserted that "no assessment of benefits against the Metropolitan Railroad Company" as such could be made.

Instructions Nos. 2 and 3 seem to us to be the reverse of the propositions contained in the other instructions, and appear to be a waiver of the contention made by the latter. The jury was thereby, at the instance of the railroad company, advised and instructed "that it can assess (such) benefits (only) against the Metropolitan Railroad Company" and "that it is not required to assess any part of the amount of damages which it shall award for and in respect of the land condemned in these proceedings against the Metropolitan Railroad Company."

These granted instructions were in harmony with section 4 of the act of June 6, 1900 (Record, page 28).

We fail to see that the act of Congress in terms required the jury to assess benefits against the plaintiff in error as a company or a person, and the court did not so instruct the jury, but it did instruct the jury in effect that it might assess benefits against the property of the company.

The jury by their verdict and award of damages in respect to the land condemned found the amount to be $181,858, and the benefits to be $90,929 and $25,000. The jury also found that the appellant company "will be benefited by the aforesaid widening of Columbia road and the present Sixteenth street," etc., "in the sum of $25,000."

To this return, finding, assessment, and award the appellant company excepted on the ground, first, that the same was without evidence to support it; second, that it was contrary to evidence; third, that it was contrary to the weight of evidence; and, fourth, for errors of law in the instructions given and refused before the said finding, assessment, and award were made.

ARGUMENT.

We are advised that error will be assigned by the appellant for the causes following, viz:

1st. The refusal of the trial court to set aside the assessment because, as it is asserted, it was unsupported by, contrary to, and against the weight of the evidence.

2d. The refusal of the trial court to instruct the jury that no assessment could be made against it as a corporation, but only against its property, if any, that might be benefited.

3d. The refusal of the trial court to instruct the jury that no assessment of benefits could be made against the appellant.

4th. In holding that Congress had power without the assent of appellant to require it to extend its road.

The whole of the testimony submitted to the jury of condemnation is not contained in the record, and therefore error will not be presumed. The absence of the testimony so produced makes it impossible to contend that the finding of the jury was either unsupported by, against, or contrary to the evidence before them, or its weight.

The evidence taken by the jury is only partly produced, while, on the other hand, if reliance is placed on the testimony of Mr. Lackey, the jury may have disbelieved his statements. And in support of the judgment of two courts on the verdict of such jury, if necessary, it is submitted, this

court will presume accordingly. At least error is not presumed, but must be shown.

By stating that the evidence before the jury is only partly produced in this record, we do not mean the absence of the "view" of the jury and its necessary effect, but that and the testimony of many witnesses respecting the boundary parcels along the whole length and on each side of this street railway extension, which was given, but is wholly omitted from this record. Therefore it cannot be asserted that this assessment of benefits was either contrary to the evidence or against the weight of it.

Why, indeed, did not the "view" aid the jury in determining the benefit to the railroad? Surely the surroundings and trend of improvements disclosed thereby may well and correctly have induced the jury to find the benefit, Mr. Lackey to the contrary notwithstanding.

Here is a populous and popular section of the city, where many buildings have been built and are building and land is rapidly advancing in value, and it is not doubted that since the verdict was confirmed the passenger traffic has paid interest on the capital invested and the running expenses of the extension. If, however, that point has not yet been reached, it will be in the near future, and at no remote period it will return a profit on the whole investment and repay all the expenses that have been previously incurred. Tested by the consideration of the interest on the cost of construction, increase by operating expenses, and probable increase of earning capacity, if need be, still the assessment of benefits is small. In fact, the assessment ought to be larger, considering the money value of the franchise.

In considering the testimony of Mr. Lackey, Justice Hag-

ner, presiding in the supreme court of the District of Columbia, said:

* * * * * * *

"Although the railroad company denies having been instrumental in this direction, the examination of Mr. Lackey, the railroad official (so far as his statements may be regarded as binding the company), fails to establish their contention. He admits, however, although he cannot speak for the company, that it wants the improvement, provided it is not to contribute toward its cost. But the act, from the title throughout, conveys the contrary idea, and substantially asserts that the railroad was the efficient cause of the passage of the act, since the widening of the road became necessary in order to accommodate the double tracks of the railroad. The existing width of the road and street might have been ample for the use of vehicles traveling along them if the railroad tracks were not to be laid over one-third of their width. It is alleged in behalf of the railroad company that the assessment made against them is inordinately large, and on that account alone should be declared invalid.

"From the testimony of Mr. Lackey, taken literally, the railroad company could not have afforded to build the road, but the result could not be as unfavorable to the company as he seems to believe, for, if there were no assessment at all against it in this proceeding, according to his testimony, the interest on the first cost of laying the new track would be $6,000 (or very close to $5,850), and the annual running expenses would possibly be $8,000, which would make about $14,000 as the annual charge resulting from the extension of the new track, and he says it would require one thousand passengers a day to make up this sum, and he does not believe there would be such an increase of travel. Assuming such passengers paid on an average between five and four and a half cents, the daily average receipts of these one thousand passengers would be $45.83; their yearly receipts from them would be

$16,720, or more than Lackey's estimate by $2,720; and the interest on the $25,000 assessment by the jury in this case at five per cent. would be $1,250, which, deducted from the $2,750, would leave a surplus from the $16,720 in the hands of the company of $1,470. But all this contemplates no increase of travel in all future time. Mr. Lackey says the cars run eighteen hours a day. Accordingly, if there were a thousand persons transported within the eighteen hours, in each hour there would be fifty-five persons, which does not seem an unreasonable estimate. But his estimate seems to be much too large, since the added cars used and the wages and expenses would not be chargeable entirely to this improvement; and the proportion of the wages and use of the cars, properly chargeable at first to this short line, would be a trifling part of the expense. It would be most short-sighted if the court should act upon this idea that there would be no considerable increase in the travel in the future, taking into consideration the proximity of the Rock Creek park and the Zoo to the line of the new road, and the increase of travel from the extension of Sixteenth street, to Park street, for the accommodation given to the residents in that vicinity who are now compelled to rely upon the Fourteenth Street road. I am obliged to repeat what I have previously said with respect to the exceptions by some of the land-owners, that I cannot say the finding as to the railroad company is wrong; certainly not manifestly wrong, and that I see no such injustice as to justify the conclusion that improper considerations influenced the verdict of the jury."

By what evidence is it demonstrated in this record that private property "in substantial excess of the special benefits accruing" (Norwood *vs.* Baker, 172 U. S., 279) to the railroad company has been taken?

We submit that nowhere on this record does it affirma-

tively appear that the railroad was not specially and peculiarly benefited by this extension of their route. That this assessed benefit was reasonably and fairly certain and so valuable we think that no one but the railroad's secretary can deny.

This assessment of benefits against the railroad company was, at the time it was made, no more remote and speculative than were the assessments for benefits along the unimproved and widened portions of Columbia road and Sixteenth street. The benefits did not accrue to these land-owners immediately upon the rendition of the verdict of the jury any more than the benefits thereby instantly accrued to the railroad company. The land-owners and the railroad company in that regard were in the same situation. The improvement of the streets benefited the adjoining property, and the extension of the railroad along this improved route benefited the railroad company, so that neither class of benefits was more remote or more speculative than the other. Can it be contended, then, that the benefits assessed against the land-owners were void because too remote, contingent, and speculative in their nature? The jury may well have found that the probable increase of travel reasonably to be anticipated from the extension of the railroad, considering the surroundings, justified this assessment.

Assuming, for the sake of argument, that the charter of the appellant company and its amendments gave such company a vested interest in its located route, yet it is submitted, whether placed on the police power or power of taxation, Congress had the right to require this road to carry passengers at rates not unreasonably low. How can this proceeding be said to be without process of law when notice and

hearing upon the question of benefits or no benefits was saved and granted to the company and availed of by it?

The authority of State boards of commissioners to exercise control over railways has always been upheld (N. Y. & N. E. Ry. Co. *vs.* Bristal, 151 U. S., 556–571; Charlotte, etc., R. R. Co. *vs.* Gibbes, 142 U. S., 386; Wis., etc., R. R. Co. *vs.* Jacobson, 179 U. S., 287–296).

Congress in this case, instead of arbitrarily determining the amount that the appellant company should pay for the new route acquired, provided for a hearing before and finding by a jury, which was, we submit, a properly constituted tribunal for the examination into the reasonableness of the question whether benefits should be assessed against the corporation, and, if so, the amount thereof. If the sum of money awarded as benefits be unreasonable or an undue increase of operating expense compared to the earning capacity to be derived from the extension, the burden is upon the appellant to sustain such contention by evidence, and there is no such evidence, we submit, in the record.

To the objection of the plaintiff that the assessment of benefits was unjust and unreasonable we further answer that there is nothing in the record to show on which property of the railroad the benefits were assessed, whether on the existing line, the extension, or both.

The railroad had the jury instructed by prayer 2 and by prayer 3 that it could only assess benefits against the company if satisfied that it will be specially benefited by the proposed extension of Columbia road. The company is now estopped, we claim, from asserting that such instructions were incorrect.

Indeed, by section 8 of the act of June 6, 1900, the trial

judge must be satisfied that the verdict was unreasonable or unjust; otherwise, on such ground, no reason for reversal exists. We again refer to the opinion of Mr. Justice Hagner (see appendix) in considering the objections of other property-owners that the awards and assessments were unjust and unreasonable, and the opinion of Chief Justice Alvey (Record, page 35).

We quote from Shoemaker *vs.* United States, 147 U. S., 304:

"In connection with this part of the subject, we may appropriately consider the objection made to the action of the court below in declining to review and pass upon the evidence that had been produced before the commissioners.

"If, as we have said, the court below was right in refusing to restrict the commissioners to a mere consideration of the evidence adduced, then it would seem to follow that the court could not be legitimately asked, in the absence of any exceptions based upon charges of fraud, corruption, or plain mistake on the part of the appraisers, to go into a consideration of the evidence. The court cannot bring into review before it the various sources and grounds of judgment upon which the appraisers have proceeded. The attempt to do so would transfer the function of finding the values of the lands from the appraisers to the court. Such a course would have presented a much more serious allegation of error than we find in the objection as made. The rule on this subject is so well settled that we shall contend ourselves with repeating an apt quotation from Mills on Eminent Domain, 246, made in the opinion of the court below: 'An appellate court will not interfere with the report of commissioners to correct the amount of damages except in cases of gross error, showing prejudice or corruption. The commissioners hear the evidence and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried

up so as to correct the report as being against the weight of the evidence. Hence, for an error in the judgment of the commissioners in arriving at the amount of damages there can be no correction, especially where the evidence is conflicting. Commissioners are not bound by the opinion of experts or by the apparent weight of evidence, but may give their own conclusions.' "

The Court of Appeals in District of Columbia *vs.* Cemetery (5 App. D. C., 513) used the following language:

"But then, so far as concerns this appeal by the District, we fail to find anything on which to review the decision of the court below. The burden of complaint is that the valuation of the land was excessive. But we have not the means of correcting that, even if we had the authority so to do. There is nothing whatever in the record, except two *ex parte* affidavits, which, of course, we cannot regard, to show excessive valuation, or to show the grounds upon which the valuation was based. We cannot review, much less reverse, upon such a record as this. To the commissioners, and not the court, it must be remembered, the law has committed the matter of the determination of value."

The record of the testimony, so called, for and against the company was simply allowed to be filed as part of a petition (Record, p. 13), but would not the testimony respecting benefits and damages to the abutting property be necessary in order to determine whether this assessment is unjust?

II.

The charter of the appellant company being subject to alteration, amendment, or repeal, it follows that it may be compelled to extend its road in the manner required by the act of Congress.

When a charter is subject to amendment or repeal at the pleasure of the legislature it may be compelled to make alterations and construct works for the purpose of promoting the *public safety, convenience, and welfare* (1 Lewis Eminent Domain, sec. 156*e*).

In Holyoke Water-Power Company *vs.* Lyman (15 Wall., 500), it appeared that the Holyoke Company had by due authority constructed a dam across the Connecticut river to create a water-power to be used for manufacturing purposes. Subsequently, under legislative authority, commissioners of fisheries were appointed to determine and define a plan by which fishways were to be constructed by either agreement with proprietors of such dams at their own expense or upon their refusal so to do by the compulsory process of a bill in equity for specific performance.

The Holyoke Company refused after notice to construct a fishway required of it by the commissioners, and a bill in equity was filed by the latter to compel the company to build it.

It is noted in the opinion of the court that the charter contained no "provision exempting the builders and owners of the dam from the obligation to construct suitable and sufficient fishways for the free passage of fish up the river during their accustomed seasons."

But, nevertheless, the company insisted "that the acts of the legislature under which they have been *required* to make the fishways in question impair the obligation of the contract contained in the charter incorporating their grantors."

The court, in answer to this argument, said:

"Such a charter, when accepted by the corporators, is undoubtedly a contract that the powers, privileges and franchises granted shall not be restrained, controlled or destroyed without their consent, unless the power for that purpose is reserved to the legislature in the act of incorporation or some prior general law, in operation at the time the act of incorporation was passed. * * * or by some immemorial usage or general law of the State which was in operation at the time the charter was granted." * * *

"Vested rights, it is conceded, can not be destroyed or impaired under such a reserved power, but it is clear that the power may be exercised and to almost any extent to carry into effect the original purposes of the grant and to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation." * * *

"Fishways have never been constructed by the respondents in their dam, and they contend that they are not obliged to make any such provisions for the passage of the fish, as their charter does not create any such obligation, but the answer that the complainants make to that suggestion is decisive that the charter does not contain any provision exempting them from that implied obligation." * * *

"The terms and provisions of the charter are consistent with the theory that the legislature contemplated the construction of the dam with convenient passage-way for the fish, so as not to impair unnecessarily the rights of the riparian owners either above or below the dam and that the legislature if the company fail to fulfill that obligation, may

compel them to do so by more specific legislation." * * *

"Viewed in any reasonable light, it is quite clear that the charters of the respondents do not contain any stipulation or contract exempting them from the implied condition annexed to such a grant, not qualified by such a contract, that the corporation, in erecting such a dam, shall construct suitable and convenient fishways for the free passage of the fish to the head waters in their accustomed seasons; and that the charter, in view of the fact that it contains no such exemption, is subject to the power reserved to the legislature by the general law in operation when the charters were granted, that all acts of incorporation shall at all times hereafter be liable to be amended, altered or repealed at the pleasure of the legislature" (Holyoke Water Power Co. *vs.* Lyman, 15 Wall., 500).

Nor is a provision for amendment, alteration, or repeal necessary when public safety, health, morals, or necessity is involved.

An illustration of this principle will be found in Chicago, B. & Q. R. R. Co. *vs.* Nebraska, 170 U. S., 57, where it was held that a railroad company could be required to repair a viaduct, under the police power. (See also Wabash R. R. Co. *vs.* Defiance, 167 U. S., 88.)

Where a railroad company was required by the legislature to remove its tracks from a present location involving the destruction of private property thereby, the excavation of a principal highway and the building of an expensive iron bridge beyond its charter provisions, which were, however, subject to the legislative power of amendment, alteration, or repeal, and where the lower court had held that the statute complained of as a taking of property without due process operated as an *amendment* to the charter, the decision

was against the railroad on the ground, among others, that law requiring these changes was an exercise of the police power of the State.

It was also urged, without avail, as claimed substantially by counsel for the plaintiff in error in this case below, that the charter of the corporation was not controlling, because it did not include the right to arbitrarily deprive the stockholders of their property, which, though held by them under a corporate organization created by special law, was, nevertheless, private property (N. Y. & N. E. R. Co. *vs.* Bristol, 151 U. S., 556).

In Louisville, New Orleans, etc., R. Co. *vs.* Mississippi (133 U. S., 587), the validity of a statute of Mississippi which enacted "that all railroads carrying passengers in this State (other than street railroads) shall provide equal, but separate, accommodation for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition so as to secure separate accommodations," was upheld.

The court said, in speaking of this section of that law:

"So far as the first section is concerned (and it is with that alone we have to do) its provisions are fully complied with when to trains within the State, is attached a separate car for colored passengers. This may cause an extra expense to the railroad company; but not more so than State statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the State" (Louisville, N. O. & T. R. Co. *vs.* Mississippi, 133 U. S., 587).

In Minneapolis and St. L. R. Co. *vs.* Emmons, 149 U. S., 364, a statute was considered which required railway com-

panies to fence their roads and imposed a penalty on them for failure to do so.

It was objected that such requirement imposed a duty upon the company not required by contract, common law, or its charter, and therefore violated the right conferred by the charter to buy and hold lands for specified purposes, the same as any other land- owner.

But the court replied :

"To this position we answer that the extent of the obligations and duties required of railway corporations or companies by their charters does not create any limitation upon the State against imposing all such further duties as may be deemed essential or important for the safety of the public, the security of passengers and employees, or the protection of the property of adjoining owners. The imposing of proper penalties for the enforcement of such additional duties is unquestionably within the police powers of the States. No contract with any person, individual or corporate, can impose restrictions upon the power of the States in this respect. The objection that by allowing damages for the diminution of value in the adjoining farm caused by the failure of the company to fence its roads and to construct proper cattle guards, is taking property of the defendant without due process of law, falls with the supposed invalidity of such consequential damages which we hold to be within the discretion of the legislature to impose" (Minneapolis & St. L. R. Co. *vs.* Emmons, 149 U. S., 364, 367, 368).

In Richmond, &c., Railroad Co. *vs.* Richmond, 96 U. S., 521, the question whether an ordinance of the city of Richmond directed against the use of steam in the propelling of cars along the streets of the city used by the railroad deprived the company of its property without due process of

law was considered and determined against the railroad. The court said:

"All property within the city is subject to the legitimate control of the Government, unless protected by 'contract rights,' which is not the case here. Appropriate regulation of the use of property is not 'taking' property, within the meaning of the constitutional prohibition."

Richmond, &c., Railroad Co. *vs.* Richmond, 96 U. S., 521.

This court said in Shields *vs.* Ohio, in sustaining the right of the legislature of a State to fix a prescribed rate of fare for railroad passengers where a charter was subject to a constitutional provision, that "no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed:"

"The constitutional provision (mentioned) entered into the acts under which the consolidations were made, and rendered the corporations created and the franchises conferred subject to repeal and alteration, just as if they had been expressly declared to be so by the act. The act of 1873, in the particular in question, was a legitimate exercise of the reserved power of alteration, and was therefore valid. Parker *v.* R. R. Co., 109 Mass., 506."

"Another branch of the argument of the counsel for the plaintiff in error calls for some further remarks."

"It is urged that the franchise here in question was property held by a vested right, and that its sanctity as such could not be thus invaded. The answer is *consensus facit jus.* It was according to the agreement of the parties. The company took the franchise, subject expressly to the power of alteration or repeal by the General Assembly. There is, therefore, no ground for just complaint against the State."

"Where an act of incorporation is repealed, few questions

of difficulty can arise. Equity takes charge of all the property and effects which survive the dissolution, and administers them as a trust fund, primarily for the benefit of the creditors. If anything is left, it goes to the stockholders. Even the executory contracts of the defunct corporation are not extinguished. Curran *v.* Arkansas, 15 How., 304."

"The power of alteration and admendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property or corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases. Two authoritative adjudications throw a strong light from opposite directions upon this subject. We cite them only for the purpose of illustration. In Miller *v.* R. R. Co., 21 Barb., 513, the legislature, under the reserved power of alteration, required the company, which had been previously incorporated, to construct a highway across their road. The work was expensive and of no benefit to the company. The act imposing the burden was held to be void."

"In Worcester *v.* R. R. Co., 109 Mass., 103, the legislature had passed an act requiring the railroad companies therein named to unite in a passenger station in the city of Worcester (the place to be fixed as provided), to extend their tracks in the city to the Union station, and, after the extension, to discontinue parts of their existing locations. The act was held to be constitutional and valid, being a reasonable exercise of the right reserved to the legislature to amend, alter, or repeal the charters of those companies. See also Com. *v.* Essex Co., 13 Gray, 239; and Crease *v.* Babcock, 23 Pick., 334."

Shields *vs.* Ohio, 95 U. S., 319-326.

In the case approved by this court in Shields *vs.* Ohio, reported in 109 Mass., 103, it appeared that the legislature of Massachusetts had passed an act requiring the railroad companies named therein to unite in a passenger station in the city of Worcester; to extend their tracks in the city to the Union station, and after the extension to discontinue parts of their existing locations. The act also required the various roads to exercise the right of eminent domain and obtain the land necessary for the extension of their tracks at their own expense. All the objections which are now raised in this case to the constitutionality of the act of Congress of June 6, 1900, were raised by certain of those roads named in the act of the legislature of Massachusetts to the validity of that law, but the act was held by the supreme court of Massachusetts to be constitutional and valid, being a reasonable exercise of the right reserved to the legislature to "amend, alter or repeal." In that case the court said:

"The Boston and Albany Railroad Company must of necessity have a passenger station in Worcester; and it is obviously important to the public that all the other railroads named shall be connected with it. At any rate, the legislature was the exclusive judge as to that matter, and an amendment of the several charters, so as to secure such an object, was a reasonable exercise of their reserved right. It is no valid objection to such amendment, that they require corporations to extend their tracks and to exercise the right of eminent domain for this purpose, and to incur additional expense. The power to extend their tracks is often granted at their own request; and is granted with no less propriety when the interests of the public require it. The power to alter a charter includes the right to take away some of the powers granted by it, or to add new powers without which improvements of the greatest importance would be *ultra vires*.

Their compensation for the outlay is in the tolls they receive from travelers or others."

See also Fitchburg *vs.* Grand Junction Railway and Depot Company, 4 Allen (Mass.), 198.

The general proposition is thoroughly established that, in the absence of power reserved in the legislature to amend the charter or a provision in the charter that a majority of stockholders may accept an amendment thereto, the majority, by an acceptance of a material, radical, and fundamental change in the charter, can bind only themselves, and a dissenting subscriber will be discharged of his contract of subscription.

See numerous authorities at page 462 in the note to Com. *vs.* Cullen, 53 Amer. Dec., 463.

With this doctrine in view, it was held in two cases in New York that where, under a power to amend the charter, the legislature had extended the lines of a railroad in one case and a plank road in the other, that this extension did not release a subscriber, thus in effect holding that the extension of the road was not a "material, radical, and fundamental change" in the charter—or, in other words, to adopt the language of this court, the amendment was "consistent with the scope and object of the act of incorporation."

Railroad Co. *vs.* Dudley, 14 N. Y., 348.

Plank Road *vs.* Thatcher, 11 N. Y., 110.

Both of the last-mentioned cases were cited with approval in Miller *vs.* N. Y. (15 Wall. 478). In the latter case the amendatory act authorizing a city to elect seven directors of a railroad company instead of four, as theretofore provided,

was held to be a reasonable exercise of the reserved power to amend a charter.

Under a similar reserved power in the Code of Iowa it was held that the city council could require a street railway company to pave the street one foot outside of the tracks, although the original franchise only required paving between the tracks.

Sioux City Street Railway Co. *vs.* Sioux City, 138 U. S., at 107.

The case of Stanislaus County *vs.* San Joaquin & King's River Canal and Irrigation Company (192 U. S., 201) decides that the reduction of the rates of a water company organized under a general act of incorporation, wherein it was provided that such rates "Shall not be reduced by the supervisors so low as to yield to the stockholders less than 1½ per cent. per month upon the capital actually invested," may be reduced to a less rate, assuming that the general incorporation law created a contract, because of the provision of the State constitution adopted in 1849, which provided:

"Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

After a review of the cases the court said:

"These cases also hold that there is a limitation, even to the power of amendment, when reserved in the constitution or a statute of a State. Some of the cases, although holding that the power to amend or repeal was properly exercised in them, also state that the power is not without limit; that the alterations must be reasonbly made, in good faith, and consistent with the scope and object of the act of incorpora

tion, and that sheer oppression and wrong could not be inflicted under the guise of amendment or alteration; that beyond the sphere of the reserved powers the vested rights of property in corporations in such cases are surrounded by the same sanction and are as inviolable as in other cases. In reiterating this view of the power, we think that a mere reduction of rates, while still leaving reasonable, fair, or just compensation for the use of the property, is not prohibited, and we are quite clear that, even assuming there was a contract, the legislature nevertheless had the power to so alter and amend the act of 1862 as to provide for the fixing of rates as set forth in the act of 1885.

"It is not confiscation, nor a taking of property without due process of law, nor a denial of the equal protection of the laws, to fix water rates so as to give an income of 6 per cent. upon the then value of the property actually used for the purpose of supplying water as provided by law, even though the company had, prior thereto, been allowed to fix rates that would secure to it 1½ per cent. a month income upon the capital actually invested in the undertaking. If not hampered by an unalterable contract providing that a certain compensation should always be received, we think that a law which reduces the compensation theretofore allowed to 6 per cent. upon the present value of the property used for the public is not unconstitutional. There is nothing in the nature of confiscation about it."

Stanislaus County *vs.* San Joaquin & King's River Canal and Irrigation Company, 192 U. S., 201.

III.

Section 3 of the act of Congress of June 6, 1900, required that the appellant corporation complete and put in operation this extended line within one year from the date of the widening of said highways. This extension has been made, and the company, having thus accepted, should be required to pay what the jury justly determined on due process this extension was worth.

If the railroad company desired the route, or if it did not but has accepted and operated it, could Congress require such company to pay for it? We answer in the language of this court: "The State has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro*" (B. & O. R. R. Co. *vs.* Maryland, 21 Wall., 456–475).

The assessments of benefits in the sum found by the method pursued is at least, according to the contention for the plaintiff in error, a bonus. We claim that it is valid either way—as an assessment or as a bonus.

If Congress had, as we contend, the power to require the further extension of this railway line, it undoubtedly possessed the power to provide for assessments of benefits against it in common with other property.

To sustain this contention we refer to the opinion of Mr. Justice Hagner, of the supreme court of the District of Columbia, in his ruling on these exceptions, printed as an appendix to this brief, and again to the opinion of Chief Justice Alvey (Record, page 34).

It is no unusual thing, however, to make assessments

against benefited property both a personal liability and a lien against the property benefited.

Welty, Assessments, sec. 310.

Mayor, &c., *vs.* Greenmount Cemetery, 8 Md., 517.

Clements *vs.* Balto., 16 Md., 208.

Thompson *vs.* Carroll, 22 How., 422.

Elliot on Roads and Streets, sec. 567.

In Rich *vs.* Chicago, 152 Ill., 18; 38 N. E. Rep., 55, it was held that an assessment for a sewer might be levied against non-abutting property which might subsequently use the sewer. See also McKee Land, &c., Co. *vs.* Swikehard, 51 N. Y. Supp., 399.

Under an ordinance requiring the costs of an award to be assessed upon contiguous property it was held that a railroad was within the designation of property which might be specially taxed for making the local improvement.

Chicago and Alton Railway *vs.* Joliet, 153 Ill., 649, and cases cited.

The decision in that case was followed in Indiana in Peru and Ind. Railway Co. *vs.* Hanna *et al.*, 68 Ind., 567.

In the expense of paving a street, part of which was assessed against a railroad company, it was held by the supreme court of Iowa to be a tax and collectible by suit from the company regardless of any lien.

Muscatine *vs.* C., R. I. & P. R. R., 79 Iowa, at 651.

A stronger case on this point is the decision of the supreme court of Connecticut, holding that the assessment might be

collected without regard to any lien on the property of the railroad company.

New Haven *vs.* Railway Co., 38 Conn., 422; 9 Amer. Reports, 399.

A case more like that at bar than any above cited, because of the greater similarity of the law which makes the assessment directly against the company, is that of *In re* Commissioners of Hampshire County, 143 Mass., 425.

A similar assessment against the appellant company was involved in the case of The District of Colnmbia *vs.* The Metropolitan Railroad Co., 8 App. D. C., 322.

See also Wash. & Geotn. Ry. *vs.* D. C., 108 U. S., 522.
Dist. of Col. *vs.* Wash. & Geotn. Ry., 4 Mackey, 214.
Dist. of Col. *vs.* Wash. & Geotn. Ry., 1 Mackey, 361.

The record (page 40) seems to indicate that the case is here by writ of error, but there is no statutory provision for a writ of error, and none would lie, for this proceeding was not according to the course of the common law.

2 Lewis, Eminent Domain, sec. 554.

Section 13 of the act of June 6, 1900, implies that an appeal is the appropriate proceeding, and we fail to find any bill of exceptions in this case as a basis for a hearing on error assigned.

We respectfully submit that the decree of the Court of Appeals (Record, page 35) should be affirmed.

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APPENDIX.

OPINION OF MR. JUSTICE HAGNER.

The remaining exception is that of the Metropolitan Railroad Company, which objects to the validity of an assessment against it to any extent for benefits, and excepting to the return by the jury.

It is necessary to note at some length the provisions of the Act of Congress particularly applying to the railroad company. The law was approved on the 6th of June, 1900, and is:

"An Act authorizing and requiring the Metropolitan Railroad Company to extend its lines on old Sixteenth Street."

Of course, this title is not without some significance:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Metropolitan Railroad Company of the District of Columbia be, and the same is hereby, authorized and required to extend by double tracks the lines of its underground electric railroad from its present terminus at the intersection of Eighteenth street and Columbia Road easterly along Columbia Road to the present Sixteenth street northwest, thence north along Sixteenth street to Park street; Provided, That no cars shall be switched in the streets after the expiration of two years from the passage of this Act.

"SEC. 2. That before such *extension* shall be constructed Columbia Road shall be widened to a width of one hundred feet, the present Sixteenth street shall be widened to a width of eighty-five feet from Columbia Road to Park street, and in such widening the building restriction line on the eastern side of street shall be taken as far as practicable to form the eastern side of said street when widened; and also sufficient land shall be required at the northwesterly corner of Columbia road and Sixteenth street so as to allow the street-railway tracks to be laid wholly without the roadway of

Sixteenth street, as extended according to the highway extension plans; all in accordance with plans to be prepared by the Commissioners of the District of Columbia; and the said Commissioners shall institute in the Supreme Court of the District of Columbia sitting as a District Court, by petition, particularly describing the lands to be taken, a proceeding *in rem* to condemn the land that may be necessary for the extension of Columbia Road and the present Sixteenth street as herein provided, with a width of one hundred feet: Provided, That the said Commissioners are authorized and empowered to *locate* the lines of the railroad of said company *within the area so to be acquired as aforesaid*: And Provided further, That the operation of the cars of the Metropolitan Railroad within the Capitol grounds shall be under the control of the Architect of the Capitol: And Provided further, That no tracks shall be laid on any portion of the roadway of Sixteenth street as extended according to the highway extension plans.

"SEC. 3. That the extensions of the lines of the Metropolitan Railroad Company herein provided for shall be completed and put in operation within one year from the date of the widening of said highways as herein provided, and said company shall deposit with the Collector of Taxes of the District of Columbia such sums as are necessary to pay the cost of inspection of said work.

"SEC. 4. That the amount found to be due and awarded as damages for and in respect of the land condemned for the extension of Columbia Road and the present Sixteenth street, as herein provided, such proportional amounts thereof as the jury hereinafter provided shall determine shall be assessed by said jury as benefits, and to the extent of such benefits, against *respectively the Metropolitan Street Railroad Company, and collected as special assessments are collected*, and against those pieces or parcels of land on each side of Columbia Road and the present Sixteenth street northwest, along those portions of said streets that are to be widened, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia Road and the present Sixteenth street northwest, as said jury may find said pieces or parcels of land will be benefited; and in determining the amounts to be assessed against said pieces or parcels of land the jury shall take into consideration the respective situations of such pieces or parcels of land

and the benefits they may severally receive from the extension of Columbia Road as aforesaid: Provided, That if the aggregate amount of the benefits to be assessed against those pieces or parcels of land on each side of said Columbia Road and the present Sixteenth street northwest along those portions of said streets that are to be widened, and also on any or all pieces or parcels of land which will be benefited by the extension of said Columbia Road and the present Sixteenth street northwest, as said jury may find said pieces or parcels of land will be benefited, as determined by said jury pursuant to the provisions hereof is less than one-half of the amount of damages awarded for and in respect of the land condemned, the Commissioners of the District of Columbia may, in their discretion, within thirty days after the filing of said award, reject the award and assessment of said jury, and all proceedings hereunder shall be null and void.

* * * * * * *

"SEC. 10. That when confirmed by the Court the several assessments herein provided to be made shall severally be a lien upon *the land* assessed, and shall be collected as *special improvement taxes* in the District of Columbia, and shall be payable in four equal annual installments, with interest at the rate of 4 per centum per annum from the date of confirmation until paid."

It is alleged on behalf of the railroad company that the assessment is unauthorized because it has no property in the neighborhood of the improvement that could be assessed, and the actual charge that has been made against the company in the form of an assessment, is only a personal one which could not be usually made under the act. In support of this contention the counsel for the railroad company referred to a case in 42 Lawyers' Annotated Reports, 636, Asbury *vs.* Roanoke.

In that case it was decided that a law assessing benefits and making such assessments a lien on the land and a personal debt against the owner, was not in accordance with a provision of the Constitution of Virginia, and was, therefore, unlawful.

But this decision cannot control the main point in the case before us, since we are not now concerned with the question of the mode of collecting the assessment directed by the statute.

In 36 Barbour, 131, People *vs.* Lawrence, the Court said in reply to such an objection:

"If the legislature failed to make a valid provision for the collection of the assessment, or should impose a lien, not legal under the constitution, neither circumstance would affect the amount found, since the legislature may thereafter remedy the defect by future legislation."

The decision is also entirely at variance with the ruling reported in the same volume, page 48, Rolph *vs.* Fargo, in which the Dakota Court decided that a statute which authorized an assessment for benefits according to the front feet of the respective lots, was entirely constitutional, and it was not necessary the assessment should be according to the actual benefits received by each.

The opinion of the Court in Rolph *vs.* Fargo, page 649, calls attention to the fact that the taxpayer in ordinary cases (as in taxes for public schools, water supplies, licenses, &c.,) cannot object to their legality because he has not received commensurate benefits, or has not been consulted in advance, and that such objections are presented in land condemnation cases for no better reason than because of the greater ease of examining the question.

In 54 New Jersey Law Reports, also referred to by counsel for the railroad company, page 144, the act of the legislature there criticised, did not profess to include the property of the railroad company which was assessed, and none of the other cases are decisive of the contention of counsel. But suppose it to be necessary that the railroad company should possess real property near the proposed improvement, how stands the Metropolitan Company in this particular?

That the tracks of a railroad company in a street are

property that may be assessed in condemnation proceedings is clear (90 Illinois R. R. Co. *vs.* the City of Chicago, 573; Welty on Assessments, Sec. 200, note; 32 Cal. North Beach & Mission R. R. Co., 506).

"SEC. 200. Liability to Assessments.—A right of way granted to individuals or a corporation, authorizing the construction of a railroad over a public street or highway, and of operating cars thereon, for the purpose of carrying passengers for hire, and authorizing the collection of fare for such service, when such railway is constructed, becomes an easement in the soil upon which the railroad is laid and is such an interest in land as to be assessable as real estate. The fact that the railway is laid upon a public highway or street makes it no less an easement. The dedication of land for a public highway, is a dedication to the public and does not deprive the owner of any use of the land not inconsistent with such dedication. It is not a dedication for railway purposes or uses, and when a right of way is granted over the same land for a railway, the owner whose land was originally taken for a public highway—at least, when the land does not constitute a public street—is entitled to damages for the new additional use." (Welty on Assessments.)

"A franchise is property. The corporation owns property. For a long distance its track passes through a widened thoroughfare on which the travel must be greatly increased, bringing a corresponding increase of profits to the company. It would require a most flexible rule of law to establish a right of exemption in this property from contributing to an assessment of public improvement which so greatly enhances its value and profits; and we contend that no such rule has been shown." (32 Cal., 506.)

That is the case of the North Beach and Mission Railroad Company, decided by Mr. Justice Sawyer. There the first question was whether the interest of a street railway company authorized by statute to lay down tracks in a street of the city and run cars thereon for the purpose of conveying passengers, is an easement invested in such company; whether such interest of the company is enhanced in value by the widening of the street, and whether by means thereof

any substantial benefits can accrue to the company. Those questions the Court discusses at great length, and shows by a number of authorities that an easement is property, recognized as such by law. Whether the burden upon the company was imposed in a proper way, the Court held that, with its acceptance "it became a contract between the parties binding each to the observance of all its provisions."

The Court said:

"It was something more than a mere executory contract between the parties. *It amounted also to an immediate grant of an interest, and it would seem of a freehold interest, in the soil of the street to the defendants. The rails when laid would become a part of the real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors and assigns.* * * * Does the statute prescribe or authorize a different rule of apportionment of the expenses of the work with respect to appellant and other companies and corporations, from that applied to owners of land within the district benefited?

"Appellant insists that it does; that the owners of lands are to be assessed in the ratio of benefits received, while companies, appellant, are to be assessed arbitrarily in the discretion of the Commissioners as to them shall seem equitable and just, without reference to benefits likely to accrue, and that the act is, in this particular, unconstitutional. In construing statutes the object to be accomplished by the act is to be ascertained, and its provisions considered and so construed, if possible, that all its parts may have effect and operate harmoniously to perpetuate that object. In view of this principle, let us examine the statute under which this proceeding was had. Section 1 authorizes the Board of Supervisors to open, widen, and improve streets, etc., and take private lands for that purpose, etc."

After giving a description of the different sections of the Act the Court says:

"If the improvement is of so important and beneficial a character to the whole city and county as in the opinion of the Board of Supervisors it ought to be a charge upon the city and county, all the taxable property in the county is to

be assessed, and the assessment is to go upon the general assessment roll of the city and county.

* * * * * * *

"We think, upon a reasonable construction of the Act, the only principle of apportionment authorized is according to the ratio of the benefits received—that this principle of apportionment applies to railroad corporations, and companies, as well as to owners of land deemed benefited. The principle of apportionment prescribed is, therefore, uniform and not liable to the constitutional objection suggested.

* * * * * * *

"Did the Commissioners apportion the amount among the owners of lands and the appellant according to the benefits received by each?

"There is nothing in the record to show—and we have no reason to suppose—they did not. The Act, as we have seen, upon a reasonable and proper construction, requires the apportionment to be so made. Such, we think, would be the construction that practical business men, at all competent to perform the duties, would put upon it; and we have no doubt that the Commissioners so construed it." (32 Cal., 506.)

By the Act of Congress before us a franchise or concession is given to the railroad company to occupy Columbia Road east of Eighteenth street and Sixteenth street, as far as Park street, with its double tracks. Such a concession constitutes a property existing in the company, notwithstanding it has not yet taken possession of the road and laid its tracks there. This is within the principle of the decision in 4 Gill & Johnson, 144–5, and Canal Company *vs.* R. R. Co., 12 Peters, 97; Georgetown *vs.* Alexandria Canal Co., 21 Md., 131; The United States *vs.* Great Falls Co., 21 Md., 131.

"If the Canal Company had come into existence immediately, and before the railroad charter was granted, it would have taken a vested right to choose a route for the site of the canal in the valley of the Potomac, along either bank of the river, except at the upper terminus, which, whether at the mouth of Savage Creek, according to the original charter, or

at Cumberland, according to the mandatory Act of the December Session, 1826, is confined to the Maryland shore, both of those places being on that shore, and specifically designated for the upper termination of the eastern section of the canal, a right created by the charter, and existing independent of any survey or act of location or of condemnation, which would be but an exercise of that right. And if the railroad company had afterward been chartered and organized, before any exercise of that vested right by the Canal Company, it could not, by any act of location or appropriation, have defeated or overreached it. The prior grant that gave, would have preserved the prior right. It would have been a corporate right, a vested franchise, to select the most suitable ground for the construction of the canal within the assigned sphere of action, which neither of the sovereign grantors alone, nor all together, could by any direct legislative act have taken away or repealed; and much less could it be taken away or disturbed by the act of any other corporation. This franchise, this corporate right, to select and acquire land for the authorized purposes of a corporation, is property; it is an incorporeal hereditament, not a legal title to the land itself, not a mere capacity or faculty to acquire or hold land such as every individual possesses; but, in addition to such capacity, it is a right or privilege, a portion of the eminent domain vested in the corporation to acquire the legal title to land subordinated by the grant to its will, and thus to convert the incorporeal into a corporeal hereditament, and after the franchise to choose and condemn land for any particular purpose, that portion of the eminent domain granted and subsisting in one corporation, cannot be bestowed upon another, to the prejudice of the former grant; nor can any other legally acquire any such right of way or title to the land over which the franchise extends, as will hinder the former corporation in the exercise and enjoyment of its franchise. And although the Canal Company was not actually incorporated and had not accepted the charter before the railroad company was chartered and organized, yet it is entitled to all the rights, benefits, and liberties with which it would have been invested, if it had been organized before any antagonistic corporation came into existence." (4 Gill & Johnson, 144–5.)

"Congress then, having the power, authorized the Alexandria Canal Company 'to cut canals, erect dams, open

feeders, construct locks, and perform such other works, as they shall judge necessary and expedient, for completing the canal, from the termination or other point on the Chesapeake & Ohio Canal, to such place in the town of Alexandria as the Board of Directors shall appoint.' Now, as one of its termini was authorized to be either the termination, or some other point on the Chesapeake & Ohio Canal, and the other some place in the town of Alexandria; and as the Potomac lies between these termini, the authority to construct an aqueduct was granted *ex necessitati*." (Canal Co. *vs.* R. R. Co., 12 Peters, 97.)

There is another case in 21 Maryland, pages 131, 132 and 133, The United States *vs.* The Great Falls Manufacturing Company.

In 1852 Congress made an appropriation for the purpose of procuring, from such place as the President of the United States should approve, a supply of water for the cities of Washington and Georgetown, and granted permission to build an aqueduct to bring the water from the Great Falls. The Great Falls Manufacturing Company owned the place where General Meigs, representing the United States, wanted to build a dam. Leave had to be given by the State of Maryland for the canal to be brought through that State, and the Legislature of the State of Maryland passed a law (Act of 1853), Chapter 179, to this effect:

"That if the plan adopted by the President of the United States for supplying the City of Washington with water should require said water to be drawn from any other source within the limits of the State, consent is hereby given to the United States to purchase such lands and to construct such dams, reservoirs, buildings and other works, and to exercise, concurrently with the State of Maryland, such jurisdiction over the same, as may be necessary for the said purpose."

Under this law of the State of Maryland an inquisition of damages was had. In the State of Maryland all the land from the Great Falls down to the Georgetown line was condemned. The Great Falls Company presented its claim, and

the jury impaneled gave that company $100,000. It appeared in that case that the jury had taken into account, first, the water; and secondly, the soil where the abutment and dams stand, and both, they assumed, belonged to the Great Falls Company. The award was set aside. The judge decided that a man could "use the water of a river while in his hands," could drink it all up, if thirsty enough; but when once it escaped, it could no longer be a subject of value to him. But, the court said, the bottom of the Potomac River belongs to the State of Maryland. The parties in that case did what they were authorized to do—filed their affidavits, presented proof, and got their patents for these little islands up here. The case went to the Court of Appeals, and some eminent lawyers argued the case for the United States. It was insisted on the part of the Great Falls Company, of course, that the bottom of the river belonged to the State of Maryland for which land the company held patents. But it was said in behalf of the United States that this statute passed by the State of Maryland was a donation of that land at the bottom of the river prior to the date of these patents.

"The assent of the Legislature, given in the first section of the Act of 1853, to the purchase of such lands, by the United States, as should be found necessary for the purpose designated, must, therefore, be construed as a grant of a right to purchase, which the State was not at liberty to qualify or impair by any subsequent Act of the Legislature, or of its public officers. The power to enter upon and appropriate lands by process of condemnation, conferred upon the United States, is restricted by its nature, as well as by the terms of the Act, to the property of private persons, and under these circumstances the grant of the right to purchase clearly implies, so far as the State was the owner of lands that might be required, the promise or undertaking on its part to hold them subject to that right of purchase granted to the United States. If it were not so, the State would be able by refusing to part with, or hold its lands for the use proposed, to defeat the right granted, as well as prevent the

execution of the purpose contemplated by the Act of Congress to which its consent had been given in the solemn forms of a public law. The mutual intention and purpose of these acts clearly forbids any interpretation of their several provisions leading to such result.

* * * * * * *

"The theory that any right is retained to oppose or qualify the powers and privileges granted to the United States by this Act, is supported neither by reason nor authority; and we are constrained to say, that it should be repulsed by every public officer and tribunal charged with the duty of maintaining the good faith and honor of the State."

(21 Md., U. S. *vs.* Great Falls Co., pp. 131–2–3.)

The Act of Congress conferred a property of so high a nature on the Metropolitan Railroad Company that Congress would have had no right to divert it from them and confer upon a rival railroad company the power to lay tracks on the Columbia Road in the place already dedicated by it to the Metropolitan Road.

In 27 New York, 620, Millbau *vs.* Shark, it was held that the resolution of a competent authority authorizing parties to construct a railroad over the street, if valid, will create an immediate grant of an interest in the recipient company. In that case the corporation authorities of New York undertook to confer upon individuals a franchise for constructing and operating a railroad in Broadway for their private advantage. A bill was filed for an injunction to prevent it by Mr. Dudley Field, and he insisted that this grant by the authorities of the city to this railroad would be a real grant, and its existence would be a menace to the welfare of the people. The reply, on the other hand, was, that the grant was revocable and could be withdrawn.

"The plaintiffs allege that the defendants, immediately after the passing of the resolution of the Common Council, signified their acceptance thereof, and agreed to conform thereto, by writing, filed in accordance with the resolution. That the defendants, under color of the authority con-

tained in said resolution, threatened to enter upon Broadway, and take up the Russ and other pavements and dig up and subvert the soil in that part of Broadway between Whitehall and Fifty-ninth streets (including the portion thereof belonging to the plaintiffs), to take possession of said street, and lay down and establish a railroad therein and run cars thereon, for their own private interest and emolument to the great injury and damage of the plaintiffs, and other property owners on and in said street, and to their and each of their property, without making to them or either of them any compensation therefor."

When we come to the decision, the question is, What did that railroad get?

"The provisions giving the right to lay the track of the railway, determining its location, width and manner of construction, the quality of the cars, the times of their running, the motive power to be used, the mechanism, rates of toll to be charged, the amount of license fees to be paid, and the duration of the privileges granted, are all parts of a single scheme, which are incapable of separation. The whole scheme is valid, or no part of it. These privileges, whether they create a monopoly or not, constitute a franchise. The definition of franchise, by Bouvier, is a 'privilege conferred by grant from the Government and vested in individuals.' Kent says, 3 Com., 458: 'The privilege of making the road, or establishing a ferry, and taking tolls for the use of the same, is a franchise.' Railroads do not form an exception. (3 Paige, 45, 14 N. Y.) Monopoly is not an essential feature of a franchise. A corporation with banking powers would be no less a franchise, if there were no law restraining private banking, which alone gives to banking corporation the character of monopolies.

* * * * * * *

"Prior to its aeceptance by the defendants, the resolution was only a proposition having no binding force whatever. It was certainly not then a law, and since that time the Common Council have taken no action upon it. Upon its acceptance (if valid) it became a contract between two parties, binding each to the observance of its provisions. It was something more than a mere executory contract between the parties. It amounted also to an intermediate grant of an

interest, and, it would seem of a freehold interest in the soil of the streets to the defendants. The rails, when laid, would become a part of real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors and assigns. I say perpetually, because there is no limitation in point of time to the continuance of the franchise, and no direct power is reserved to the corporation to terminate it."

According to these authorities the Act of Congress conferred upon the railroad company the right to lay down its double tracks upon sufficient land, at the northwesterly corner of Columbia Road and Sixteenth street, which the Act directs should be acquired by the company; and such land, when so acquired as land of the company, will be answerable for the benefits assessed against the company. Moreover, the existing tracks of the company have been already laid as far as the western limits of Eighteenth street, on Columbia Road; and the extension of these tracks authorized by the Act before us, will commence at a point in immediate contact with the eastern limit of the existing tracks. When the new tracks shall have been laid down, they will form a part of the continuous line of tracks extending from that point to the remotest boundary of the company's road, and the new tracks will be then as much a part of the Metropolitan Railroad as the old tracks were, and any charge against the company in respect of the new tracks by way of assessments for benefits, will be against the entire track of the railroad company throughout the city, and its franchise as well.

This matter was examined by Mr. Justice Cox in case 17937 Equity, Anacostia R. R. *vs.* District, and in case 17681, Belt Co. *vs.* District, where it was held that it was impossible to segregate a portion of the road and sell that distinct from the rest of the track—that the franchise and all the property of which the railroad company was owner constituted its possessions and was answerable for its engage-

ments. As the existing tracks, as they now are situated up to the west side of Eighteenth street, are in immediate contact with the line of the projected improvement, it would be difficult to point out why that road already laid may not be considered as property of the company sufficiently near to the new improvement to justify an assessment of benefits under the statute.

But I see no reason why Congress in the exercise of the power of taxation could not properly direct the Commissioners to assess against the railroad company a sum, which, in their judgment, was commensurate with the advantages it would receive from the extension of its tracks in the manner proposed, without a reference to its condition as a holder of land in the vicinity.

In 135 United States, 345, Spencer and Merchant, land owners, who had been excused from a prior assessment for want of notice, were assessed a second time under a subsequent law for the sums from which they had thus been relieved, together with interest and costs of the litigation. The Supreme Court held that such a law, adding the interests and costs to the first assessment, as within legislative discretion, which was not to be controlled by the courts, although in the particular case it could not be contended that the benefits were commensurate with the charges exactly under the second law, and the costs and interest were assessed without any reference to any benefits to land, and were not assessed upon the land at all.

It is true this mode of assessing may be an unusual one here with respect to street openings; but it could not be denied that Congress might require a railroad company, and as the price or consideration of a franchise extended to it, to pay a sum, either to be named in the law by Congress itself, or to be ascertained by a jury of inquisition, to be applied to the expense of the improvement. Such requirements have been constantly made in charters granted to railroad companies; a familiar instance is the case of

the Baltimore Street Railway Company, when one-fifth of all the gross receipts of the railroad company when chartered were required to be paid to the city for some return for the valuable franchise conferred upon the street railway; and the great park in Baltimore has to a large degree been paid from the proceeds of this assessment or tax. Congress having reserved the right to alter the charters of these street railway companies at its pleasure, might well, subsequent to their incorporation, make a similar exaction when called on to amend a charter by extending the line of the operations of the road. This is precisely what is being done in the present case. This great road, with its numerous far-reaching franchises, has thus far been called upon to make no contribution to the public in the form of a price for the franchise given it. Congress authorized, as appears in the statute before us, the enlargement of the powers of the railroad company by giving it a new field of operation, which it is obvious must be beneficial to the railroad, enabling it, as it would do, to land passengers in much nearer proximity to the Great Zoological Gardens, and to the village of Mt. Pleasant, and ultimately, by preoccupying the ground, to procure a still further field of operation to the utmost limits of Sixteenth street, when extended.

It would be strange, indeed, if no power existed in Congress, under such circumstances, to make some exaction in consideration of this benefaction and practical monopoly—of a kind which in many cities have been often a source of great wealth to those receiving them.

The Baltimore & Ohio Railroad, when first incorporated, was by the terms of its charter exonerated from all taxes; and as the result, in progress of time, its hotels with their furniture, its great steamships plying to Europe, its elevators and wharves in Baltimore, and a variety of property which no one would hold as a necessary part of a railroad, returned no revenue watever to the State by way of taxes. But

when the railroad company found it necessary or expedient to procure amendments to its charter, the Legislature provided that all the classes of property of the character I have named should thereafter be subject to taxation; and the validity of this tax has not been denied by the courts.

That the widening of the road and street would be beneficial to the railroad could not be doubted—it would be impossible for the double tracks to be laid on Columbia Road and Sixteenth street unless they had each been widened, and it would be inequitable that the company, which would be so largely benefited, should be the only property holder in the neighborhood that should not bear part of this charge. The same equitable consideration applies to this that applies to the large majority of taxes. In numerous cases the law expressly directs that part of the expense of opening these roads should be charged against the District; by the present law the tax-payers in general in the District are required to pay one-half. Where is there any evidence in this case of any benefit to the tax-payers in general from the condemnation? And yet this jury has mulcted the citizens in general with $90,000 which they must pay without a murmur.

The gross expense of the condemnation as stated by the jury is $180,000; one-half of which, about $90,000, is thus chargeable against the people at large, a large portion of whom have never seen the property in controversy and may never use the road in any way; and will, at the most, use it at very rare intervals.

The assessable property in the District is estimated at $190,000,000. If we had a few citizens here like Carnegie, the Vanderbilts, Astors, Rockefellers, and Goulds, they might well own one-half of this amount in real estate in the District and thus would be required to pay one-half of $90,000 toward the cost of opening these streets; and yet no one of them would ever be consulted by Congress or anybody else as to the necessity or propriety of opening the road, so far as the public is concerned, or as to the extent of benefits that

may be received by the public at large; although, according to the supposition I have made, the tax-payers would thus be compelled to pay in silence the sum of $45,000, more than thirty times as much as the jury has charged against this private land-owner in the neighborhood of the improvement, who has been assessed to pay the largest sum for benefits, and nearly twice as much as has been assessed against the Metropolitan Railroad.

It seems absurd for the land-owners along the line of this projected improvement gravely to contend that they are not to be permanently benefited by the opening of wide streets in the neighborhood of their lands now lying useless and unproductive, with the advantage of having sewerage and lighting and other comforts at the public expense; and it is equally absurd for the railroad company to contend that it will not certainly be benefited by the public outlay which will afford them the opportunity to extend their lines in the manner authorized and directed by the Act before us. Yet such is practically the position of both classes of property-holders who are objecting to this award.

In Cooley's Constitutional Limitations, the author (496) discusses the various methods of assessing property:

"There are some kinds of taxes, however, that are not usually assessed according to the value of property, and some which could not be thus assessed. And there is probably no State which does not levy other taxes than those which are imposed upon property. Every burden which the State imposes upon its citizens with a view to revenue, either for itself or for any of the municipal governments, or for the support of the governmental machinery in any of the political divisions, is levied under the power of taxation, whether imposed under the name of taxes or under some other designation. The license fees which are sometimes required to be paid by those who follow particular employments are, when imposed for purposes of revenue, taxes; the tolls upon persons or property, for making use of the works of public improvement under and controlled by the State, are a species of taxes; stamp duties when imposed are taxes; and it is

not uncommon, as we have already stated, to require that corporations shall pay a certain sum annually, in proportion to their capital stock, or by some other standard, and each is the mode regarded by the State as most convenient for the taxation of such organizations. It is evident therefore that the constitutional requirements sometimes met with, that taxation upon property shall be according to value, do not include every species of taxation; but all special cases like those we have here referred to are, by implication, excepted."

If the railroad company was instrumental in procuring the passage of the Act, it is doubtful whether it can now question its validity, said Judge Shiras in delivering the opinion of the Court in the case of Wright *et al. vs.* Davidson *et al.:*

"It may well be doubted whether the appellees are in a position to question the validity of the statute. They are the owners of the 'Kall' tract mentioned in the first section of the Act, and with respect to which it was made a condition that the owners should dedicate the land in said tract contained within the lines of the streets to be extended; and, it appears by the record that, in order to procure the desired action of the Commissioners, they did dedicate to the District of Columbia, for highway purposes, the land in said tract contained within the lines of S, Twenty-second, and Decatur streets.

"Prior to the filing of the petition of the Commissioners the authorities of the District had taken no steps toward the contemplated extension of these streets. In fact, under the act they had not power to do so. The power was called into action by the dedication of the Kall tract. By such dedication the appellees put the Act into operation, and voluntarily subjected themselves to its provisions, including the mode of assessment. The constitutional right against unjust taxation is given for the protection of private property, and may be waived by those affected who consent to such action to their property as would otherwise be invalid.

"'Under some circumstances a party who is illegally assessed may be held to have waived all right to a remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. Such a case would exist if one should ask for and

encourage the levy of the tax of which he subsequently complains; and some of the cases go far in the direction of holding that a mere failure to give notice of objections to one who, with the knowledge of the person taxed, as contractor or otherwise, is expending money in reliance upon payment from the taxes, may have the same effect.' Cooley on Taxation, 573; Tark *vs.* Adams, 10 Cush., 252; Bidwell *vs.* City of Pittsburg, 85 Pa. St., 472; Lafayette *vs.* Fowler, 34 Ind., 140; Shutte *vs.* Thompson, 5 Wall., 151, 159."

Although the railroad company denies having been instrumental in this direction, the examination of Mr. Lackey, the railroad official (so far as his statements may be regarded as binding the company), fails to establish their contention. He admits, however, although he cannot speak for the company, that it wants the improvement, provided it is not to contribute toward its cost. But the Act, from the title throughout, conveys the contrary idea, and substantially asserts that the railroad was the efficient cause of the passage of the Act, since the widening of the road became necessary in order to accommodate the double tracks of the railroad. The existing width of the road and street might have been ample for the use of vehicles traveling along them if the railroad tracks were not to be laid over one-third of their width.

It is alleged in behalf of the railroad company that the assessment made against them is inordinately large, and on that account alone should be declared invalid.

From the testimony of Mr. Lackey, taken literally, the railroad company could not have afforded to build the road, but the result could not be as unfavorable to the company as he seems to believe, for, if there were no assessment at all against it in this proceeding, according to his testimony, the interest on the first cost of laying the new tracks would be $6,000 ("or very close to $5,850"), and the annual running expenses would possibly be $8,000, which would make about $14.000 as the annual charge resulting from the extension of the new track, and he says it would require one thousand

passengers a day to make up this sum, and he does not believe there would be such an increase of travel. Assuming such passengers paid on an average between five and four and a half cents, the daily average receipts of these one thousand passengers would be $45.83; their yearly receipts from them would be $16,720, or more than Lackey's estimate by $2,720; and the interest on the $25,000 assessment by the jury in this case, at five per cent., would be $1,250, which, deducted from the $2,750, would leave a surplus from the $16,720 in the hands of the company of $1,470. But all this contemplates no increase of travel in all future time. Mr. Lackey says the cars run eighteen hours a day. Accordingly, if there were one thousand persons transported within the eighteen hours, in each hour there would be fifty-five persons, which does not seem an unreasonable estimate. But his estimate seems to be much too large, since the added cars used and the wages and expenses would not be chargeable entirely to this improvement; and the proportion of the wages and use of the cars, properly chargeable at first to this short line, would be a trifling part of the expense. It would be most short-sighted if the Court should act upon this idea that there would be no considerable increase in the travel in the future, taking into consideration the proximity of the Rock Creek Park and the Zoo to the line of the new road, and the increase of travel from the extension of Sixteenth street, to Park street, for the accommodation given to the residents in that vicinity who are now compelled to rely upon the Fourteenth street road.

I am obliged to repeat what I have previously said with respect to the exceptions by some of the land owners that I cannot say the finding as to the railroad company is wrong; certainly not manifestly wrong, and that I see no such injustice as to justify the conclusion that improper considerations influence the verdict of the jury.

The exceptions of the railroad company are, therefore, overruled, and I will sign an order confirming the award of the jury with the exception of the Deering claim.

CLAPP CASE.

OPINION OF MR. JUSTICE HAGNER.

Numerous as are the exceptions to the award of the jury, the parties objecting do not constitute one-tenth of the persons interested, which tends to show that the work of the jury upon the whole was performed in a proper manner.

As the exceptions were filed before the decision of the Supreme Court of the United States in the Davidson case, they very generally embody the various objections—"want of notice" and "unconstitutionality"—which were sustained by the Court of Appeals in their decision in that case. It is, of course, unnecessary now to examine this class of objections, since the law has been settled otherwise by the Supreme Court.

The great mass of the remaining exceptions relate to objections based upon the alleged insufficiency of the valuations affixed by the jury to the portion of the property condemned for the widening of Columbia road and of Sixteenth street, and of the alleged exorbitancy of the assessments upon the various properties found by the jury to be benefited by the proposed improvement.

The general rules respecting exceptions for errors on the part of commissioners or juries in the valuation of lands, or in the assessment of benefits against them, have been so repeatedly stated by the Courts that it is hardly necessary to quote from the authorities; but the following may be assumed as settled principles governing the subject.

The report of the commissioners or jury is assumed to be correct, since to them and not the Court the law has confided the function of determining the values. Where there is no evidence of misconduct on the part of the jury, the Court will not set aside the verdict on the ground that it is ex-

cessive, unless the amount awarded appears to be manifestly wrong, and this, even where the evidence of one of the jurors is filed stating that in his opinion the verdict is too high; or, as elsewhere expressed, when complaint is made of error in the valuation of land taken, the judgment of the commissioners, when lawfully exercised in the absence of strong objections, is conclusive.

"Where the proceedings are before a Court and the tribunal is appointed by the Court, a report should be made to the Court, although not expressly required by statute, and the Court can accept or reject the report as justice may require. As the Court acts judicially in such matters, it can only act upon them in term time, unless by express provision of the statute. Though the statute provides that the report of commissioners shall be final and conclusive, it may set aside for fraud or misconduct. It means that, upon matters committed to the charge of the commissioners, their judgment shall be conclusive when lawfully exercised. A statute provided that the court should not set aside the report of surveyors for illegality or irregularity. It was held to refer to *matters of form* merely, and not to matters of *substance*.

"Sometimes statutes provide that the Court may set aside reports for good cause shown, or for sufficient cause. Under such statutes the practice would be the same as in any case where the Court had power to act in the matter of accepting or rejecting the report. And, though the statute authorizes the court to direct a new appraisal before the same or new commissioners, *at its discretion*, it was held that the Court should not interfere unless some substantial error had been committed. In general it may be said that good grounds for setting aside a report are, any defect or insufficiency in the proceedings prior to the appointment of the tribunal, which would have been an adequate reason for refusing the appointment and which have not been waived by the objector, or any mistake, irregularity, or partiality in the proceedings of the tribunal materially affecting the merits of the case."

(Lewis on Eminent Domain, Sec. 520.)

Where it is not really shown that substantial injustice has been done, the proceedings of the jury will be approved, the

presumption being that the jury took in account all the facts bearing upon the question of damages, and that there was no bias on their part in the way of a fair verdict. Especially are the courts indisposed to set aside the verdict of a jury in cases where the jury have viewed the premises.

"The report of the verdict may be set aside on the ground that the damages awarded are too much or too little. In setting aside a report on the question of damages, the Court will be governed by the same principles as obtain in the case of the verdicts of juries in common law suits. Where there is evidence to sustain the verdict and the testimony is conflicting, the Court will not interfere; and especially is this the case where the commissioners or jury have viewed the premises. Where the owner petitions for damages, it is error to allow him more than he claims in his petition. Or a petition to condemn a piece of land large enough for a telegraph pole, adjacent to a railroad over one hundred and fifty feet across defendant's track, there being eleven poles on defendant's land, a verdict for $3,850 was set aside as grossly excessive. A verdict or award which is more than the amount testified to by the witnesses of one party and less than the amount testified to by the witnesses for the other, will not be disturbed on the question of amount alone. Where the award was $50,000, and the petition dismissed the proceedings and commenced anew, and a second award was made of $18,000, the Court, in view of the great discrepancy in the two reports and the conflicting evidence as to value, granted a new trial. Where the first report was set aside because only nominal damages were awarded, and a second report was made also for nominal damages, and no irregularity appeared, the Court refused to set aside."

(Lewis on Eminent Domain, Sec. 524.)

When the jury of condemnation are authorized and required to view the premises, their functions are in the nature of those exercised by assessors rather than those of jurors, as in ordinary cases, since the purpose of the view is to furnish evidence to the jury; and the Court cannot re-examine the merits of the report of the viewers and set it aside for mere inadequacy, although the law under which

they are acting authorizes the report to be heard and affirmed or set aside, as may be lawful and right.

(Pa. R. R. Co. *vs.* The First German Lutheran Congregation of Pittsburg, 83 Pa. State, 447.)

In 84 Mo. 412, City of Kansas *vs.* R. R., the Court said when the verdict is not so flagrantly unjust as to justify the conclusion that improper considerations influenced their verdict, the Court cannot interfere; the view is evidence, and the Court cannot see how far their verdict is rendered on the other evidence, and how far it is attributable to their own observation and judgment.

The amount of compensation is to be determined by the jury from the actual survey of the premises when practicable, from their own knowledge of the valuations, and from the opinions of witnesses familiar with such matters; but they are not bound by the opinions of the witnesses as to the estimate of value or damages. They are not like juries in ordinary civil and criminal cases, bound by the weight of the evidence, but may be governed actually by the view itself. (9 Gill and Johnson, 479, Tide Water Canal Co. *vs.* Archer.) Or as was expressed (in 54 N. J. L. Rep., Davis *vs.* Newark) by the Court in speaking of exceptions to alleged excessive charges for benefits:

"To justify interference on this ground, evidence that the judgment of the commissioners was erroneous must be cogent. I have not been able to find in the evidence sufficient to satisfy me of any error on the part of the commissioners. There is much difference of opinion, however, based on the same facts; but I see no reason to overthrow the judgment of the commissioners who gave special attention and care to the judgment."

The testimony to invalidate the verdict in a case of this character as to the ascertainment of damages and the assessment of benefits almost always consists of that of the parties to the proceedings testifying for themselves and for others

similarly situated, sometimes of the attorneys representing parties holding the lands in controversy, and at other times representing other lands similarly situated; and there must be very fair witnesses against the awards who do not occupy one or more of these relations to the subject.

Much of this testimony appears to have been based merely upon the observation of the land by the witnesses; and it appears, so far as the Court can find anything in the record bearing on the subject, that such observation was of short duration. On the other hand, the judgment of the jury, by the terms of the Act of Congress, was required to be rendered by seven judicious and disinterested men, not in the service or employment of the District of Columbia or of the United States, to be summoned by the Marshal for the District, men who should make oath that they were not in any manner interested in the land to be condemned or in any way related to the parties interested therein; and in the present case these persons, acting under this oath of office and admitted to be men of high character, were engaged in the examination of every portion of these lands for a much longer time than any of the witnesses who were adduced to impeach the award, and they heard the entire testimony respecting each finding returned by them under their oaths.

These commissioners, with the single exception of the case of Deering, with respect to lot 18 in block 14 where a mistake of $50 is said to have been made, are unanimous in their assertion that their verdict was, as they had sworn it should be, just and fair to all persons interested. The only intimation of anything like misconduct on their part is contained in the account of a conversation with one of the commissioners, Mr. Towles, as to the manner in which the jury arrived at certain of their valuations. That testimony was intended to show that some, at least, of the assessments of benefits were arbitrarily increased for the purpose of aggregating a sum equal to one-half of the gross amount of the damages returned. But, assuming that conversation to

have been correctly understood and reported and as truly representing the impressions of Mr. Towles (which is disputed by him in his affidavit and denied by others of the jurors), there is nothing to show that any others of the jurors entertained any such views. Unless this were shown to be the case, the individual opinion attributed to Mr. Towles could not be taken as invalidating the opinions of the other six jurors. In 51 N. Y., Supplemental Reports, p. 406, McKee Land & Improvement Co., of Rochester, *vs.* Swikehard *et al.*, it was held that, improper remarks by one of the commissioners, in regard to their assessing property for a sewer, not having been shown to have affected the action of any other member of the commission, was not to be considered as prejudicial to the owners of the land. The Court said:

"Testimony was introduced, and much is claimed for it to show that one of the commissioners (Luetchford) was governed by improper considerations in his actions upon the commission in the assessment of the McKee tract. His language was approved, and cannot be defended. It did not, however, occur at any time when action was being taken as to the McKee tract. In fact, a preliminary statement of the apportionment had already been prepared before Luetchford's remark, which, when applied to the McKee tract, shows that the McKee assessment had been practically arrived at by informal action of several members of the commission before Luetchford referred to it. The case does not show that the commission, or that the action of any member was affected by it; in fact, the contrary appears."

And supposing it was true that the estimates of the jurors were changed in some individual instances with a view to arriving at an aggregate equal to one-half of the damages found, yet, there is nothing to show that those changes in the direction of increasing the particular assessments of benefits; and the information is perfectly consistent with the idea that the changes referred to effected a

diminution of those particular assessments instead of increasing them.

If the fact that some or all of the jurors empaneled in any ordinary case had varied in opinion during their consultation as to how they should find their verdict, or as to its amount, were to be accepted as invalidating their final deliverance to the court, very few verdicts would be allowed to stand. That some unexplained cyphering was dicovered upon the back of some papers that had been before the jury was something, probably, that quite frequently might appear and in many cases, where the jurors instead of leaping at the result, have deliberated of their verdict, as would be their duty. What the jury in this cause swore was that their verdict was rendered, " without favor or partiality, and to the best of their judgment," and their oath was not made as to the meaning of the casual cyphering referred to.

The complaint that the Attorney of the District claimed in his address to the jury that they should return an amount as *benefits* equal, at least, to one-half the sum of the award of damages, as pointed out in the Act, furnishes no just ground for impeaching the verdict. Whether it would have been better had the remarks alluded to been omitted it is not necessary to decide, as it was admitted by the Attorney at the time in reply to a question by a juror that he was not speaking for the Commissioners of the District, and the jurors were no more bound to abide by his opinion on that point than by the various remarks that must have been made by the numerous attorneys who appeared for the land holders.

Only a few of the exceptions present any new point. The greater majority consist of the usual objections that the allowances of damages for land taken are too low ; and that the assessments for benefits are too high. These objections are frequently made, with an apparent inconsistency, by the same land owner. An instance of that is shown in the exceptions of Louis Ballioux, who swears with respect to his land that the assessment for benefits " is grossly exorbitant

and the amount awarded for damages is grossly inadequate, which, if true, would seem to impute to the jury a remarkable amount of ignorance and lack of judgment, or of moral or mental perversity."

One of the forms of exception more out of the usual track appears in the objection filed by Lydia A. Tanner to the assessment of lot 102 for benefits in the present proceeding (No. 577), on the ground that part of the same lot will, in another proceeding (No. 580), be comprehended within the lines of another projected street. But this has been held by the courts to constitute no valid objection to the condemnation for benefits in another case—as has been decided in this Court in this class of proceedings. See also 113 Pa. State, 536, Michaner *vs.* City of Phila., as follows:

"The plaintiff alleges, however, that his property is not benefited by the sewer. He may or may not be mistaken in this. We cannot say. But this is a species of taxation, and all taxation is presumed to be for the benefit, directly or indirectly, of the taxpayer, or his property. Laid as taxes are, under general laws, there will always be cases of apparent individual hardship. The childless man may claim that the taxes which he is compelled to pay for the education of the children of other persons confer no benefit upon him. The law does not so regard it. Education produces a higher degree of intelligence, the fruits of which are seen in increased good order and diminished crime. When a man comes to pay his general taxes he cannot be permitted to allege that he derives no benefit therefrom. And it would be improbable if in every instance of special taxation the question of benefits could be thrown into the jury box. It would introduce into municipal government a novel and dangerous feature. It would substitute for the responsibility of councils, limited though it be, the wholly irresponsible and uncertain action of jurors. It is better to endure the ills we have than fly to those we know not of."

It would, of course, be impossible for me to discuss *seriatim* each of these exceptions. I have examined them all by the light of whatever appears in the case that can be properly

called evidence. Whether it would have been wiser to have required a record to be presented of the evidence adduced before the jury is a matter for the legislature to decide. Such a record, to be of any value, should, of course, omit nothing; for something important testified to with respect to one of the undisputed awards might necessarily be applicable by the jury to every other case, and no part of it could be justly omitted if the appellate court should have a full understanding of what occurred; and it would be a difficult thing to transfer to paper the precise effect their view of the land had upon the jury, as it would only be formulated in the conversation and discussion by the jurors themselves. Suffice it to say, the statute makes no such requirement; and there was no such record made. And the partial, *ex parte*, affidavit placed in the papers by particular excepting land owners must present to the Court a very meager view of what actually was testified to before the jury, or of what was imbibed by them from their own observation of all the parcels and improvements.

I can only take time to notice with any particularity a few of the exceptions of this class most particularly insisted.

The protests of Mrs. Breckinridge, of the company of Rider, Wolcott, Sanders, W. W. Brown, and some others, are based upon the idea that it is unjust to confine the assessment of benefits to the lots immediately abutting on the Columbia road, but that they should apply to all property from which it adds a convenient access to the city.

On the other hand, Mr. Cousar and Heinz, and others protest against *their* lots being charged with any benefits, because they are so *remote* from Columbia road, and do not abut upon it.

These objections seem to answer each other.

Westmoreland, Dr. Davis, and others except to the low valuation of their lands, because, they allege, they paid for them at a higher rate when they became the owners. But

even if their statements to this effect are correct, they would only be a few of a large number of persons who have made unwise purchases, and neither their error of judgment nor the fall of prices in the particular locality can prevail against the sworn judgment of intelligent and conscientious jurors swearing to their belief of the present value of the lots.

According to others of the exceptions, the jury erred or acted improperly in almost every possible respect, including the particulars relied upon in the opinion of the Court of Appeals, before referred to. Others base their objections upon the fact that the street and road have not yet been widened and that the property of the lot owners should not be assessed until the benefit has been actually *earned* by the opening of the street.

The argument of counsel for Mr. Clapp and several others of the exceptors presented their grievances in an able and exhaustive manner. But I find myself unable to arrive at the conclusion that the sums reported for values or benefits are manifestly wrong or unjust, and that the complaints of interested parties under the circumstances appearing in the record should be allowed to prevail against the award of the seven intelligent and impartial jurors who carefully examined the lands for themselves besides listening to all the testimony brought before them by all the land holders and the District authorities.

After looking at the papers there is a good deal to be said about that. It seems to me that the better reason for holding to the reported valuation of the land is that nobody could use it for any but one purpose, and that is as building lots. How would you get to them? There must be some way. Of course, the land is laid out into building lots. Ultimately, if the owner should want to have a street cut through there, he would have to give up his land with no compensation. He has no sewerage, no light, no water—has not anything at all. Is it not beneficial to have the road at

the side of this land improved? Would not that tend to develop the value of the land lying remote thereto, which land would not be fit for any use whatever except what I have stated?

I therefore overrule all these exceptions I have been considering, except that of Mr. Deering, which I must regard as an error in recording the valuation agreed upon as $50 instead of $100.

Supreme Court of the United States.

No. 16.—October Term, 1904.

Metropolitan Railroad Company, Appellant and Plaintiff in Error, *vs.* Henry B. F. Macfarland, Henry L. West and John Biddle, Commissioners of the District of Columbia.	Appeal from and in error to the Court of Appeals of the District of Columbia.

[November 28, 1904.]

Upon this record the Metropolitan Railroad Company seeks, both by appeal and writ of error, to obtain a review of the action of the Court of Appeals of the District of Columbia, affirming an order of the Supreme Court of the District, which order sustained an award against the company, contained in the verdict of a jury rendered in condemnation proceeding, under an act of Congress. (31 Stat. 668.) The statute referred to is entitled "An act authorizing and requiring the Metropolitan Railroad Company to extend its lines on old Sixteenth street." Briefly, the act authorized and required the company to extend its lines over the streets to which the act referred, and for the purpose of enabling this to be done directed the commissioners of the District to commence the necessary proceedings to acquire the land needed for the widening of the streets. It was directed that the condemnation proceedings should be commenced in the Supreme Court of the District upon notice, under the supervision of the court, to all interested parties. A jury of seven was directed to be empaneled by the court, and this jury, after organizing and viewing the premises, were to "proceed, in the presence of the court, if the court shall so direct, or otherwise as the court may direct, to hear and receive such evidence as may be offered or submitted on behalf of the District of Columbia and by any person or persons having any interest in the proceedings for the extension of said street." The act required the jury to return a written verdict fixing the amount of damages sustained by the lot owners by reason of the taking of their property for the widening of the streets, and also to ascertain and fix the benefits which would result from the work, not only to the lot owners but to the Metropolitan Railroad Company, and the sum of the benefits was directed to be assessed against the railroad company and the lot owners. Power was conferred upon the court to hear any objections which might be made to the verdict and to set it aside in whole or in part if the court were satisfied that it was unjust or unreasonable.

Section 13 of the act is as follows:

"SEC. 13. That no appeal by any interested party from the decision of the Supreme Court of the District of Columbia confirming the assessment or assessments for benefits or damages herein provided for, nor any other proceedings at law or in equity by such party against the confirmation of such assessment or assessments, shall delay or prevent the payment of the award to others in respect to the property condemned nor the widening of such streets: *Provided, however,* That upon the final determination of said appeal or other proceeding at law, or in equity, the amount found to be due and payable as damages sustained by reason of the widening of the streets under the provisions hereof shall be paid as hereinbefore provided."

The transcript before us shows that in July, 1900, the commissioners of the District instituted the proceedings in condemnation required by the act, and that among others the Metropolitan Railroad Company was made a party. A jury having been empaneled they were directed by the court to view the premises, and outside of the presence of the court to hear such evidence as might be produced by the interested parties, and to return their verdict to the court. Soon afterwards the railroad company filed an answer praying that it might be dismissed from the proceedings, because the act of Congress requiring the company to extend its lines was unconstitutional, and because the company could not be made liable for any assessment for benefits conferred upon it by the proposed work, as it owned no property in the District embraced by the improvement. Immediately following the answer of the railroad company is set out what purports to be instructions asked by the railroad company to be given by the court to the jury. Each of these instructions is marked by the clerk as filed on a named date, and below each instruction, unaccompanied by any certificate from a judge, is the statement "Rejected with permission to present later." Following these papers is what purports to be a notice on behalf of the railroad company, that on a given day it would present a request to the court for the giving of the refused instructions as well as of others, and the paper in question, as also the instructions referred to in it, are marked filed by the clerk on a date named, and below some of the instructions, without any certificate whatever by the judge, is a recital "Rejected and exception by the Railroad Company" or "Granted, and exception by D. C. and also by G. F. Williams on behalf of certain property owners."

The transcript shows that the jury returned a verdict to the court fixing the damages and benefits, and that there was assessed against the railroad company for benefits the sum of $25,000. A rule *nisi* was entered to confirm the verdict, and the railroad company filed the following exceptions:

"The Metropolitan Railroad Company excepts to the finding, assessment, and award against it for alleged benefits to it from the proposed widening and extension of the said Columbia road and Sixteenth street, and for cause or ground of exception shows:

"1. That the said finding, assessment, and award are without evidence to support the same.

"2. That the said finding, assessment, and award are contrary to the evdence.

"3. That the said finding, assessment, and award are contrary to the weight of the evidence.

"4. For errors of law in the instructions given and refused by the court to the jury over the objection and exception of the Metropolitan Railroad Company before the said finding, assessment, and award were made, as shown by the record of the said cause."

After the filing of these exceptions the transcript shows that a paper was filed by the clerk, which is styled "Petition of Metropolitan R. R. Co., to make of record testimony as to the benefits to Metropolitan Railroad Company." In this petition it is recited that the evidence before the jury was taken outside of the presence of the court, and that the only testimony before the jury on the subject of the benefits to the railroad company, as shown by affidavits annexed to the petition, was that of James B. Lackey, which was reduced to writing by a stenographer. The court was asked to to allow the affidavits and deposition to be filed as part of the record, "the same being essential to the hearing and determination of this respondent's" exceptions to said award filed in this cause, and it being impossible for this respondent properly to defend its rights in the premises without in some way causing the said evidence, and the fact that it was the only evidence in the case upon the question of said benefits to this respondent to appear of record." Upon this petition the following endorsement is shown: "Let the within petition be filed. A. B. Hagner, Justice." The transcript then sets out what purports to be the affidavits and testimony of Lackey, referred to in the petition.

It is also shown that upon a subsequent date the Supreme Court of the District, after due notice to all interested parties, and after hearing arguments of counsel upon the exceptions to the verdict, overruled the exceptions and entered a final decree confirming the award and assessment as found by the jury, except in a minor particular, which need not be noticed. There is nothing in the transcript showing that any exception was reserved to the overruling of the objections to the award interposed by the company, and no bill of exceptions is shown to have been been allowed by the judge. Immediately at the foot of the final decree appears the following:

"And from so much of the above decree as overrules its exceptions and confirms the verdict, award, and assessment against it, the Metropolitan Railroad Company appeals in open court, and the penalty of the appeal bond is fixed by the court at one hundred dollars.

A. B. HAGNER, *Asso. Justice.*"

Next follows a stipulation signed by the attorneys for the District and for the railroad company as to what should constitute the transcript of record for the purposes of the appeal of the Metropolitan Railroad Company. Item 11 reads as follows:

"Petition of Metropolitan Railroad Co. to make of record certain testimony and allowance of same, filed November 24, 1900.

"Motion [illegible] order on said petition."

The motion last referred to, however, does not appear in the transcript.

On the appeal of the railroad company the Court of Appeals affirmed the order appealed from, (20 App. D. C. 421,) and from its action in so doing the railroad company prayed and was allowed an appeal to this court. About a month afterwards the attorney for the railroad company filed in said Court of Appeals a motion in the cause, reading as follows:

"And now comes the appellant by its counsel and shows to the court that because of the fact that the record in this cause contains what may possibly be considered a bill of exceptions it may be that the proper remedy would be held to be a writ of error instead of an appeal to the Supreme Court of the United States. It therefore prays that this honorable court, in addition to the appeal which was granted to it to the Supreme Court of the United States in this cause on the 24th day of October, 1902, it may also be allowed a writ of error to said court, and that the supersedeas bond required upon said appeal may also be taken and accepted as a supersedeas bond upon said writ of error."

An entry appears in the transcript of the allowance of a writ of error, the filing of a bond conditioned for the prosecution both of the appeal and writ of error, and the transcript contains citations, as well on the writ of error as on the appeal, signed by the Chief Justice of the Court of Appeals. The consolidated proceeding, by appeal and writ of error, is the one which is now here for review.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

Assuming that the matters complained of are susceptible of review by this court, the first question is whether our jurisdiction is dependent upon the appeal or the writ of error.

That a proceeding involving the exercise of the power of eminent domain is essentially but the assertion of a right legal in its nature has been determined. So also the decisions of this court have settled that a condemnation proceeding initiated before a court, conducted under its supervision, with power to review and set aside the verdict of the jury, and with the right of review vested in an appellate tribunal, is in its nature an action at law. (*Kohl* v. *United States*, 91 U. S. 367, 376; *Searl* v. *School District No. 2*, 124 Ib. 197; *Chappell* v. *United States*, 160 Ib. 499, 513.)

The proceedings provided for in the act of June 6, 1900, being of this character, it is, we think, manifest that the jurisdiction of this court can be exercised only by writ of error.

When both the proceeding by appeal and that by writ of error were allowed the jurisdiction of this court to review the judgments and decrees of the Court of Appeals of the District of Columbia was regulated by section 233 of the Code of the District of Columbia. (31 Stat. 1227.) In effect that section was but a re-enactment of the then existing provisions of the eighth section of the act of February 9, 1893, which act established the Court of Appeals of the District of Columbia. By said section of the code the power of this court to review by writ of error or appeal the judgments or decrees of said Court of Appeals, excluding certain exceptional and enumerated cases, is limited to cases where the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars, and such power to review is to be exerted only in the same manner and under the same regulations as theretofore prevailed before the organization of the Court of Appeals in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia.

Now, as it is settled by the authorities previously referred to that the proceeding in question was legal in its nature and not one of equitable cognizance, and as it has also been settled that the jurisdiction of this court prior to the act of 1883, to review the final judgments or decrees of the Supreme Court of the District of Columbia, did not give power to review by appeal, a matter not of equitable cognizance, (*Ormsby* v. *Webb*, 134 U. S. 47, 64,) it necessarily follows that we are without jurisdiction to review the action of the Court of Appeals of the District of Columbia on the appeal here taken, and that appeal must, therefore, be dismissed.

Thus disposing of the appeal we come to consider the case on the writ of error. The errors assigned in the brief of counsel are as follows:

"The court below erred in sustaining the trial court:

"1st. *In refusing to set aside the assessment because not supported by the evidence, and because contrary to the same and the weight thereof.*

"2d. *In refusing to instruct the jury that no assessment could be made against it as a corporation, but only against such of its property, if any, as might be benefited.*

"3d. *In refusing to instruct the jury that no assessment of benefits could be made against appellant.*"

In view of the condition of the record as disclosed by the statement of the case which we have made, we are of opinion that we cannot pass upon the errors embraced by these assignments.

The inability so to do results from the fact that there is no bill of exceptions in the record showing that the Supreme Court of the District of Columbia was asked to and refused to give the alleged instructions upon which the second and third assignments of error depend, nor does it appear,

from a bill of exceptions or in any other appropriate mode, upon what the Supreme Court of the District of Columbia acted in considering the exception expressly stated to be based upon the evidence. Not only this, but there is nothing of record exhibiting the fact that any exception was duly taken to the action of the court in overruling the objections urged by the railroad company to be confirmation of the verdict of the jury.

True it is that the transcript contains what purport to be certain instructions asked and refused, marked filed by the clerk. True also is it that there is in the printed transcript a petition and other papers concerning the evidence given before the jury, to which we have referred in the statement of the case. And it is also true that there is in the printed transcript an agreement between counsel, reciting that the court allowed the prayer of the petition. But in the absence of a bill of exceptions, allowed and authenticated by the judge, these documents form no part of the record in this court, which we have alone the right to consider in determining the merits of the errors assigned. (*Young* v. *Martin*, 8 Wall. 257; *Baltimore & Potomac R. R. Co.* v. *Sixth Presbyterian Church*, 91 U. S. 127; *Clune* v. *United States*, 159 Ib. 593; *Nelson* v. *Flint*, 166 U. S. 276, 279.)

In *Young* v. *Martin*, where entries had been made by the clerk in his minutes, stating the filing of a demurrer, argument thereon and overruling of the demurrer, and that exception had been taken by plaintiff, it was held that the exception was not available. The court said (p. 356):

"These entries do not present the action of the court and the exceptions in such form that we can take any notice of them. It is no part of the duty of the clerk to note in his entries the exceptions taken, or to note any other proceedings of counsel, except as they are preliminary to, or the basis of, the orders or judgment of the court."

It may be observed in passing that whilst it is not now necessary to seal a bill of exceptions, (Rev. Stat. sec. 953,) the other requisites referred to are essential.

In *Baltimore & Potomac R. R. Co.* v. *Sixth Presbyterian Church*—a case similar in character to that under review—the court said (pp. 130, 131):

"Neither depositions nor affidavits, though appearing in the transcript of a common-law court of errors, can ever be regarded as a part of the record, unless the same are embodied in an agreed statement of facts, or are made so by a demurrer to the evidence, or are exhibited in a bill of exceptions.

* * * * * *

"Exceptions may be taken by the opposite party to the introduction of depositions or affidavits; and the party introducing such evidence in a subordinate court may insist that the court shall give due effect to the evidence, and, in case of refusal to comply with such request, may except to the ruling of the court, if it be one prejudicial to his rights. Where neither party excepts to the ruling of the court, either in respect to its admissibility or legal effect, the fact that such a deposition or affidavit is

exhibited in the transcript is not of the slightest importance in the appellate court, as nothing of the kind can ever constitute the proper foundation for an assignment of error. (*Suydam* v. *Williamson*, 20 How. 433)

"Inquisitions like the present one bear a strong analogy in many respects to the report or award of referees appointed under a rule of court, to whom is referred a pending action. Referees in such cases make their report to the court; and in such a case the report, unlike an award at common law, must be confirmed before the prevailing party is entitled to the benefit of the finding of the referees. When the report is filed in court the losing party may file objections in writing to the confirmation of the report, and may introduce evidence in support of the objections; and it is well-settled law that the ruling of the court in overruling such obections is the proper subject of a bill of exceptions. (*Railroad* v. *Myers*, 18 How. 250.)"

In *Clune* v. *United States*, in the course of the opinion the court said (159 U. S. 593):

"Finally, there is a claim of error in the instructions, but the difficulty with this is that they are not legally before us. True, there appears in the transcript that which purports to be a copy of the charge, marked by the clerk as filed in his office among the papers in the case; but it is well settled that instructions do not in this way become part of the record. They must be incorporated in a bill of exceptions, and thus authenticated by the signature of the judge. This objection is essentially different from that of the lack or the sufficiency of exceptions. An appellate court considers only such matters as appear in the record. From time immemorial that has been held to include the pleadings, the process, the verdict, and the judgment, and such other matters as by some statutory or recognized method have been made a part of it."

That parties by their affidavits or agreements cannot cause that to become a bill of exceptions which is not such in a legal sense, is settled. (*Nelson* v. *Flint*, 166 U. S. 276, 279; *Malony* v. *Adsit*, 175 U. S. 281, 285, and cases cited.)

As it results that the record before us does not exhibit error, the judgment of the Court of Appeals of the District of Columbia must be and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.